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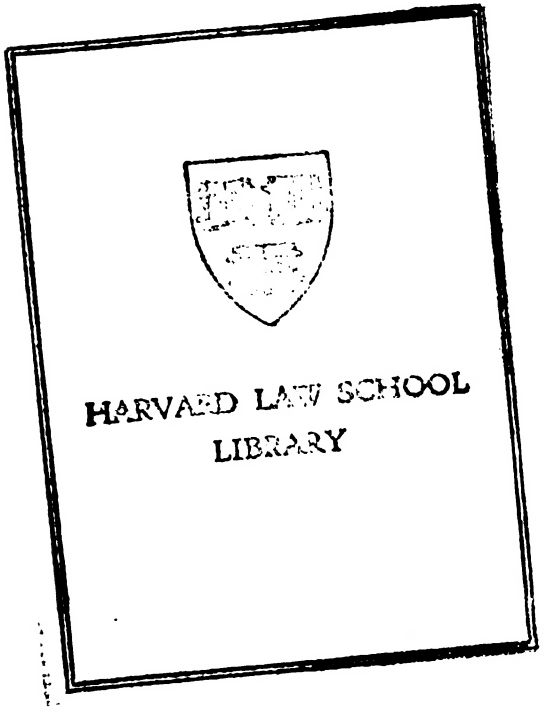
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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

FROM AND INCLUDING DECISIONS OF FEBRUARY 6, TO DECISIONS OF APRIL 24, 1906,

WITH

NOTES, REFERENCES AND INDEX.

BY EDWIN A. BEDELL,
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EDWARD T. BARTLETT,
ALBERT HAIGHT,
IRVING G. VANN,
WILLIAM E. WERNER,
ASSOCIATE JUDGES

WILLARD BARTLETT,
FRANK H. HISCOCK,
EMORY A. CHASE,
JUSTICES OF THE SUPREME COURT SERVING AS ASSOCIATE JUDGES.*

* Designated by the Governor January 8, 1906, under section 7 of article VI of the Constitution, as amended in 1899.

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CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

COMMENCING FEBRUARY 6, 1906.

BRIDGET O'DONNELL, Respondent, *v.* THE CITY OF SYRACUSE, Appellant.

1. MUNICIPAL CORPORATIONS — LIABILITY FOR THE OMISSION OR COMMISSION OF CORPORATE ACTS. A municipality is not liable for an injury, unless it appears that some duty, incumbent upon it to perform, has been neglected or has been improperly discharged; the act, the omission or commission of which is charged as the cause of the injury, must have been within the scope of its corporate powers, as provided by the charter or by some positive enactment of law, and must be ministerial in its nature; if the duty be judicial in its nature, or if it relate to legislation in the public interest or the undertaking of some work of a public nature, which the municipality has not been commanded to do by the state, however comprehensive the powers conferred may be, the duty is necessarily discretionary, because within the exercise of a deliberate judgment.

2. HIGHWAYS. The fact that a river or stream flowing through a city has been declared a public highway by statute, does not ordinarily impose upon the municipality the duty to keep the stream in a safe condition or free from obstructions, not of its own causing.

3. WHEN CITY IS NOT LIABLE FOR FAILURE TO MAKE PROVISION AGAINST FLOODS IN STREAM USED AS OUTLET FOR ITS SYSTEM OF SEWERS. Where a municipality is using, and for many years has used, a stream or creek, running through the city, as an outlet or drainage canal for its system of sewers, under the authority of its charter and other special statutes conferring ample powers upon the municipal authorities with respect to the regulating, deepening and improving of the creek and the use thereof for drainage purposes, but no absolute duty with respect to it has been enjoined upon the city by statute, it is not liable to a property owner whose premises were injured by an extraordinary freshet or

flood, in which the waters of the creek rose to an unusual height, overflowed its banks and thereby caused much damage to such premises, upon the ground that no effective provision had been made to protect the inhabitants of the city and their property against the dangers of freshets or floods, increased, or at least contributed to, by the use of the creek for sewerage purposes; since the mere use of the stream as an outlet to its system of sewers is not of itself such an assumption of dominion over the stream as to make the city liable for a failure to maintain it in a safe condition; and assuming that the city had full power to make provision for obviating the danger of an overflow, its failure to exercise it was not the neglect of an absolute duty.

O'Donnell v. *City of Syracuse*, 102 App. Div. 80, reversed.

(Argued December 4, 1905; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 10, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The plaintiff recovered a judgment against the defendant for damages resulting to her property from an overflow of Onondaga creek, upon her allegations that the occurrence was chargeable to the neglect of the defendant to perform its duties, either assumed, or devolved upon it by law, with respect to the proper care and maintenance of the channel of the stream. The action came on for trial before a referee, who made findings of fact, from which he reached the legal conclusion of the defendant's liability. So far as material, the following were the facts found: On the 15th day of December, 1901, the water in the creek rose to an unusual height, overflowed the banks, reached the lot of the plaintiff, filled the cellar of her house and flooded her lot to the depth of about two feet. The water was mixed with sewage, coming from sewers constructed by the defendant and emptying into said creek. As a result of the flood, a portion of plaintiff's lot was washed away; fruit trees, vines and bushes were destroyed; articles of personal property were destroyed, or injured; sewage deposits were left; the grouting in the cellar was loosened and the walls were damaged. Onondaga creek rises in the highlands, in the southern part of the county of

Onondaga, passes in a northerly direction through the central portion of the city of Syracuse, and empties into Onondaga lake. The creek, from the lake to the south line of the Indian reservation, which is several miles southerly from the south line of the city, was declared a public highway by an act of the legislature in 1801. It does not appear that said creek has been used for purposes of navigation, except that prior to 1850 it was used to some extent for floating logs. There were in operation in said city twenty-three sewers that emptied into said creek, all of which had been constructed by the defendant. They were seventy-five miles in length; thirty-five miles of which were in paved streets. These sewers operated to produce a larger and quicker flow of the creek, than would have been produced in their absence, and "contributed to some extent to the overflow in question." The court found that "the defendant was incorporated in 1847. In 1854 the legislature conferred upon the common council power to make ordinances to clear out and deepen the channel of said creek and for the removal of obstructions therefrom, and by the revised charter of 1885, edited 1894, power was given directly to the common council to regulate and to clear out, deepen and improve the said channel, and require obstructions to be removed from the same." It was found that "for many years prior to December, 1901, the channel of said creek had been considerably and materially obstructed by accumulations of ashes, cinders and dirt, or other rubbish, thrown in from the banks or floating down stream, by bars of sand or gravel and by refuse from the sewers, and these obstructions by impeding the flow contributed to the overflow in question;" that "the flow of water was also impeded by several bridges constructed by the defendant;" that "the flood of December, 1901, was an extraordinary one; that in 1865 there had been a flood equal to it, or greater; that since that time there have been other floods but not so large; that the liability from the situation of the watershed of the creek to rapid accumulation and overflow in case of heavy rain or melting snow had not diminished since

1865, but rather increased; that in January, 1897, the attention of the common council of the defendant was especially called to this subject by one of its own committees; that the flood in question was such a one as might have been reasonably expected to occasionally occur; that the right of the defendant to use the creek as an outlet of the sewer was recognized by the legislature as early as 1872; that, by reason of the extensive use by the city of the creek for that purpose, it had become a part of the sewer system and its use was necessary to the efficiency of that system and that, as such, the city had the care and charge of the same; that it was the duty of the defendant to keep the channel of the creek in a reasonably safe condition for the discharge of the sewage and water; that it failed to perform this duty and that such failure contributed to produce the overflow in question and was one of the efficient causes thereof." The judgment entered for the plaintiff upon this decision was affirmed by the Appellate Division, in the fourth department, and the defendant has further appealed to this court.

Walter W. Magee, Corporation Counsel (*Benjamin J. Shove* of counsel), for appellant. The defendant, because certain of its sewers emptied into Onondaga creek, was not negligent, as a matter of law, in failing to anticipate, or to provide for taking care of, within the banks of such creek, an extraordinary flood. (*D. M. Co.* v. *Town of New Haven*, 55 Conn. 510; *Garfield* v. *City of Toronto*, 22 Ont. App. 198; *Los Angeles Assn.* v. *Los Angeles*, 103 Cal. 461; *Allen* v. *Chippewa Falls*, 52 Wis. 430; *Chicago* v. *Rushin*, 99 Ill. App. 47; *Sundheimer* v. *N. Y.*, 77 App. Div. 53; 176 N. Y. 495; *Smith* v. *Agawam Co.*, 2 Allen, 355; *Sheldon* v. *Sherman*, 42 N. Y. 486; *Mundy* v. *N. Y., L. E. & W. R. R. Co.*, 75 Hun, 479.) The plaintiff wholly failed to show that any negligence of defendant was the proximate cause of injury to her premises, and that such injury would not have occurred except for some negligence of defendant. (*Ring* v. *City of Cohoes*, 77 N. Y. 83; *Laidlaw* v. *Sage*,

158 N. Y. 101; *Rider* v. *S. R. T. R. Co.*, 171 N. Y. 155; *Leeds* v. *N. Y. T. Co.*, 178 N. Y. 121.) No absolute duty to improve the creek was imposed by statute upon defendant. (2 Dillon on Mun. Corp. [4th ed.] §§ 949, 950, 966; *Cain* v. *City of Syracuse*, 95 N. Y. 87; *Coonley* v. *City of Albany*, 132 N. Y. 153; *Griffin* v. *City of New York*, 9 N. Y. 462.) The defendant is not liable by reason of the fact that the creek was used as an outlet for its sewers. (*Graves* v. *Village of Olean*, 64 App. Div. 598; *Hentz* v. *City of Mount Vernon*, 78 App. Div. 515; *Blizzard* v. *Danville*, 177 Penn. St. 479; *Smith* v. *City of Auburn*, 88 App. Div. 396; *Spink* v. *Corning*, 61 App. Div. 84; *Seifert* v. *City of Brooklyn*, 101 N. Y. 136; *Byrnes* v. *City of Cohoes*, 67 N. Y. 204; *Noonan* v. *City of Albany*, 79 N. Y. 470; *Garrett* v. *Vil. of Canandaigua*, 135 N. Y. 426.) The defendant is not liable for any increase of overflow into the creek from surface drainage caused by improvements such as paved streets and gutters and exclusive of sewers and diverted waters. (*A. B. Co.* v. *Dobbs Ferry*, 84 Hun, 274; 156 N. Y. 695; *Wheeler* v. *City of Worcester*, 10 Allen, 603; *Wilson* v. *Waterbury*, 73 Conn. 416.) The defendant not having collected and precipitated its waters upon plaintiff's premises, the defendant cannot be held liable by reason of the fact that the creek was inadequate to carry this flood, and consequently is not liable for failure to so increase its capacity. (*Watson* v. *City of Kingston*, 114 N. Y. 88; *Paine* v. *Vil. of Delhi*, 116 N. Y. 224; *Rutherford* v. *Holley*, 105 N. Y. 632; *Mills* v. *City of Brooklyn*, 32 N. Y. 489; *Smith* v. *Mayor, etc.*, 66 N. Y. 295; *Lynch* v. *Mayor, etc.*, 76 N. Y. 60; *Seifert* v. *City of Brooklyn*, 101 N. Y. 140; *Urquhart* v. *City of Ogdensburg*, 91 N. Y. 71; *Garrett* v. *Vil. of Canandaigua*, 135 N. Y. 436; *Wilson* v. *Waterbury*, 73 Conn. 416; *Carr* v. *Northern Liberties*, 35 Penn. St. 325.) The defendant was not negligent in the construction and maintenance of its bridges. (*Atwater* v. *Trustees*, 124 N. Y. 602; *Bellinger* v. *N. Y. C. R. R. Co.*, 23 N. Y. 42; *Uline* v. *N. Y. C. & H.*

R. R. R. Co., 101 N. Y. 98; *Urquhart* v. *City of Ogdensburg*, 91 N. Y. 67; *Wheeler* v. *City of Worcester*, 10 Allen, 591; *Sprague* v. *City of Worcester*, 13 Gray, 193; *Van Pelt* v. *Davenport*, 42 Iowa, 308.) The defendant is not liable by reason of its failure to remove the alleged encroachments in the stream. (*Coonley* v. *City of Albany*, 132 N. Y. 153; *Cain* v. *City of Syracuse*, 95 N. Y. 87; *Griffin* v. *City of New York*, 9 N. Y. 456; 2 Dillon on Mun. Corp. § 951; *Wheeler* v. *City of Worcester*, 10 Allen, 591; *Yates* v. *City of Milwaukee*, 10 Wall. 497; *Gunning* v. *City of Buffalo*, 62 App. Div. 497; *K. T. Co.* v. *Schultz*, 116 N. Y. 382; *Smith* v. *City of Rochester*, 92 N. Y. 463; *B. P. L.* v. *N. Y., etc., R. Co.*, 10 Abb. N. C. 107; *Morgan* v. *King*, 35 N. Y. 454.) Even if defendant were held liable upon the ground of nuisance or trespass and invasion of property rights, then plaintiff could recover from defendant only such proportion of damages sustained as could be reasonably shown due to defendant's wrongful acts. (*Schriver* v. *Vil. of Johnstown*, 54 N. Y. S. R. 574; *Chipman* v. *Palmer*, 77 N. Y. 51; *Bamber* v. *City of Rochester*, 26 Hun, 587; 97 N. Y. 625; *Maximilian* v. *Mayor, etc.*, 62 N. Y. 160; *Ham* v. *Mayor, etc.*, 70 N. Y. 459; 2 Dillon on Mun. Corp. § 974; *N. Y. & B. L. Co.* v. *City of Brooklyn*, 71 N. Y. 580; *Van Valkenburg* v. *Mayor, etc.*, 43 Barb. 109.)

Theodore E. Hancock and *John N. Mosher* for respondent. The defendant having used the creek as an open trunk sewer by so doing became liable for its condition and was required to keep the same in proper repair. (S. & R. on Neg. § 287; *Sammons* v. *Gloversville*, 175 N. Y. 346; *Spielman* v. *Portage*, 41 Wis. 144; *Blizzard* v. *Danville*, 177 Penn. St. 479; *Hentz* v. *City of Mt. Vernon*, 78 App. Div. 515; *Kranz* v. *Baltimore*, 64 Md. 491; *Noonan* v. *City of Albany*, 79 N. Y. 470; *R. L. Co.* v. *City of Rochester*, 3 N. Y. 463; *Barton* v. *City of Syracuse*, 36 N. Y. 54; *McCarthy* v. *City of Syracuse*, 46 N. Y. 194; *Taylor* v.

Austin, 83 Minn. 247.) The duties of the city of Syracuse in relation to the Onondaga creek were ministerial and not judicial, and the defendant was liable by reason thereof. (S. & R. on Neg. [5th ed.] § 287; *R. W. L. Co.* v. *City of Rochester*, 3 N. Y. 463; *Evans* v. *Long Island City*, 78 Hun, 242; *Seifert* v. *City of Brooklyn*, 101 N. Y. 136.) Defendant's bridges across the creek were obstructions to the flow of water therein. (13 Am. & Eng. Ency. of Law, 690, 691; *Drake* v. *N. Y. C. & H. R. R. Co.*, 75 Hun, 422; *Brown* v. *Cayuga Co.*, 12 N. Y. 486; *Mundy* v. *N. Y. L. E. Co.*, 74 Hun, 479; *Parker* v. *City of Lowell*, 11 Gray, 353; *Lawrence* v. *Fairhaven*, 5 Gray, 110; *R. W. L. Co.* v. *City of Rochester*, 3 N. Y. 463.) The defendant is liable for diverting waters from other catchment areas, charging the same with sewage and filth, and discharging the same into the creek, thereby overtaxing its capacity and causing it to overflow its banks. (*Stanchfield* v. *Newton*, 142 Mass. 110; *Seifert* v. *City of Brooklyn*, 101 N. Y. 126; *Magee* v. *City of Brooklyn*, 18 App. Div. 22; *McCarthy* v. *Vil. of Far Rockaway*, 3 App. Div. 379; *Gillette* v. *Kinderhook*, 77 Hun, 604; *Urquhart* v. *City of Ogdensburg*, 91 N. Y. 67; *Noonan* v. *City of Albany*, 79 N. Y. 470; *Carl* v. *Vil. of Northport*, 11 App. Div. 120; *Talcott* v. *City of New York*, 58 App. Div. 514.)

GRAY, J. The theory of the defendant's responsibility, maintained by the learned referee in an opinion, was that, by practically taking possession of Onondaga creek for its municipal purpose, it had "converted a natural watercourse into a public sewer" and its duty was "the same as if the sewer was originally artificial." Hence, it was "bound to maintain it in a reasonably safe and efficient condition" and having failed to perform this duty, the failure was an efficient cause of the injury to the plaintiff's property. At the Appellate Division, this theory of liability was concurred in. It was thought that, from the use made of the creek, "the city was called upon to exercise, affirmatively, its governmental functions to reduce to a minimum the damages likely

to result from the use" and that "the affirmative obligation, inseparably linked with this user, throws upon it the burden of paying whatever damages resulted from the overflowage, although the unusual flood was the inducing cause and responsible for the greater proportion of the damages." I am unable to agree with the courts below in this view of the city's responsibility towards its inhabitants. I might suggest that, as it was found that the city's acts but contributed "to some extent" to the overflow of the creek, it was error to hold it liable for a damage to the plaintiff, to which the acts of others, not acting in concert with it, had contributed. The channel of the creek had been obstructed by the throwing in of ashes, cinders, dirt and rubbish from its banks and by the formation of bars of sand and gravel; so that others than the city were, measurably, responsible for interfering with the channel of the stream. The municipality was chargeable, only, with that much of the damage which was caused by its wrongful acts and if the damage was incapable of separation and the proportions of liability could not be established, that fact affords no reason for holding the city responsible for the tortious acts of others. The rule is discussed in *Chipman* v. *Palmer*, (77 N. Y. 51), in the light of both the American and the English cases and is summarized in the statement that "where different parties are engaged in polluting, or obstructing, a stream, at different times and different places, the whole damages occasioned by such wrongful acts cannot be collected of one of the parties." (See, also, *Sammons* v. *City of Gloversville*, 175 N. Y. 346.) I think the rule is applicable to this case; but I prefer to place its decision upon a broader ground and to hold that no responsibility whatever lay upon the city for what damage the plaintiff, or others, similarly situated, may have sustained by reason of the extraordinary rise and overflow of the creek.

It will not, I assume, be disputed that a municipality would not be liable for the consequences of a mere overflow of the stream, or river, upon whose banks the settlement had been made and had grown into the proportions of a city, in

the absence, of course, of any conditions enjoining some duty with respect thereto, through the neglect of which injury had been occasioned. Indeed, it was conceded below that no duty, ordinarily, would be cast upon a municipality to restrain the waters between the banks and, hence, none to indemnify its citizens against the consequences of freshets, or floods. But the argument is that the city, by its user of Onondaga creek, under its charter and ordinances, and under certain statutes, came under a responsibility for its safe condition. That is to say, that it had assumed a dominion over the stream by converting it to its use for sewer purposes and was, therefore, under an "affirmative obligation, inseparably linked with the user," of paying the damages resulting from an overflow. This is a broad proposition and, as I think, an unwarrantable extension of the rule of municipal liability. In order that a municipality shall be made liable for causing an injury, it must appear that some duty, incumbent upon it to perform, had been neglected, or had been improperly discharged. The act, the omission, or commission, of which is charged as the cause of the injury, must have been within the scope of the corporate powers, as provided by the charter, or by some positive enactment of law. A municipal corporation is the delegate of sovereign power to legislate as to the public needs of the locality. It may be said, in a sense, to possess a dual character. It acts in a governmental capacity, to the extent that it exercises its powers in matters of public concern, and it acts in a private capacity, in so far as it exercises its powers, under its by-laws, for private advantage, in matters pertaining to the municipality, as the proprietor of the various works and properties. (*Lloyd* v. *Mayor, etc., of N. Y.*, 5 N. Y. 369.) It exercises the governmental powers delegated by the state over the particular political subdivision thereof and it cannot be held liable for the non-exercise of, or for the manner in which it exercises, those discretionary powers, which are classed as of a public, or legislative, character. But where the duty is a corporate one, having relation to its special interests, and it is absolute and perfect, and not dis-

cretionary in its nature, in the performance of which the plaintiff has an interest, his action will lie against the municipality for the damages occasioned by a failure to perform. In other words, if the duty be judicial in its nature, as calling for the exercise of judgment, no liability rests upon the municipality for non-performance; whereas, if it be of a ministerial nature, neglect to perform it will render the municipality responsible to one injured thereby. (See Dillon on Municipal Corporations, §§ 753, 778; *Griffin* v. *Mayor, etc., of N. Y.*, 9 N. Y. 456; *Lloyd* v. *Mayor, etc., of N. Y., supra.*) It is a principle of municipal responsibility, early accepted from the common law, in this state, that in the acceptance of a charter sufficient consideration is found in the grant of powers and franchises to support an implied undertaking to perform what duties are imposed, which will enure to the benefit of every individual interested in their performance. (*Weet* v. *Trustees of Village of Brockport*, 16 N. Y. 161 note; *Cain* v. *City of Syracuse*, 95 ib. 83.) But, in the application of the principle, the distinction is to be borne, constantly, in mind that a corporate duty is not always absolute. For instance, if it relate to legislation in the public interest, or to the undertaking of some work of a public nature, which it has not been commanded to do by the state, however comprehensive of the matter the powers conferred by charter, or by positive legislative enactments, may be, the duty is, necessarily, discretionary, because within the exercise of a deliberate judgment. Nor does it follow that, although there may be an admitted corporate control of the subject, an absolute and imperative duty arises. (*Cain* v. *City of Syracuse*, *supra.*)

I think we may, at once, dismiss from our minds any consideration of the argument that, because Onondaga creek had been declared a public highway by statute, a peculiar duty had devolved upon the city in consequence, pertinent to this case. The ordinary rule of municipal obligation, with respect to the care and maintenance of highways, under the statute, does not apply and no duty, ordinarily, rests upon the munici-

pality, through whose boundaries a river, or stream, passes, in whole, or in part, to keep it in a safe condition, or free from obstructions, not of its own causing. (*Seaman* v. *Mayor, etc., of N. Y.*, 80 N. Y. 239; *Coonley* v. *City of Albany*, 132 ib. 145.)

In the discussion of this case, I accept its facts, as they are established by the findings of the trial court, and I find the theory of the plaintiff's recovery to be contained, substantially, in this proposition, that a peculiar responsibility rested upon the city of Syracuse, by reason of an assumption of corporate dominion over the creek, in using it as a part of its sewerage system, under provisions of its charter and of special legislative enactments, and that the neglect to exercise, or the imperfect exercise of, the power, effectively, to protect the inhabitants against an overflow of the stream, made the city liable in damages to any one injured thereby. The liability of the city was predicated upon the notion of its negligence in the performance of municipal duties incumbent upon it, with respect to the maintenance of the channel of the creek. No negligence is found, nor appears, so far as mere construction of sewers, or of bridges, is concerned. It was the effect of the former, as increasing the flow of the stream, that is made to support the charge of negligence in not providing for the adequate carriage of the waters from freshets and floods. As to the bridges, their construction was authorized and it was an unquestionable duty of the municipality, whose territory the stream separated, to construct them as connections and portions of the streets, or highways. No liability was thereby cast upon the city for any consequential damages, which may be claimed to have been occasioned through their having impeded the flow of the stream. (*Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Atwater* v. *Trustees of Village of Canandaigua*, 124 ib. 602.)

I consider that we must find support for this judgment, solely, in some duty cast by the statute upon the municipality and negligently performed, or omitted. I find no evidence of a corporate dominion, or control, assumed, other than in

the use made of the creek, as an outlet for its system of sewers, and it is necessary, briefly, to notice, in the light of the legal principles, to which I have above called attention, the powers conferred upon the corporate authorities in the charter legislation, or in the special acts, to which our attention has been directed. The city of Syracuse was incorporated in 1847. Onondaga creek, rising in the highlands to the south of the city, flows through it to the north; draining the extensive watershed of the country beyond the city and furnishing a natural drainage for municipal needs. The original charter provisions gave authority to the common council to make highways, bridges, sewers, etc., and imposed duties with respect to their proper maintenance and repair. In 1854, (Chap. 28 of the laws), the legislature, revising the charter, gave power to the common council to pass ordinances and to make regulations, providing, among other things, for the construction and the repair of sewers; for the regulation, straightening and improvement of the channel of Onondaga creek and for the draining of the lands adjacent thereto; for the prevention of encroachments upon the channel and for the deepening of the same. In subsequent charters, as amended, revised, or affected by legislation, ample powers were conferred upon the municipal government, with respect to the making, maintenance, or improvement, of sewers, and to the regulating, deepening and improving of Onondaga creek. In 1854 and 1855, (Chaps. 86 and 508 of the laws), special commissions were appointed by the legislature for the purpose of straightening the creek and of making a new and artificial channel and, to some extent, this work was done. By subsequent acts, commissions were appointed and powers were conferred upon the municipal authorities to establish a system of sewerage. In 1898, (§ 151 of chap. 595 of the laws), the legislature provided that "all sewers * * * shall conform in all things to the system of sewerage set forth in the report and shown by the maps made by Samuel M. Gray" etc., with power to "the common council in their discretion to make any necessary change in said system," etc.

It, also, appears that the attention of the common council had been called, by one of their committees, to the necessity of some action to avert danger from the recurrence of possible floods, by improving the channel.

We may assume, therefore, that there were lacking neither authority, nor power, in the municipal government to take any measures, relating to the improvement of Onondaga creek, nor advisory statements as to the necessity for such measures. But, clearly, all such measures were discretionary with, and lay in the judicial action of, the authorities. As to the sewers, the situation was different. Their construction, so far as it had been assumed, devolved a duty upon the municipality for their maintenance, in a proper manner and free from obstructions, which was of a purely ministerial nature; for it was a corporate obligation having relation to its special interests. (*Rochester W. L. Co.* v. *City of Rochester*, 3 N. Y. 463.) The Gray system, provided for by the act of 1898, intended an operation of the sewers, which would prevent pollution of the waters of the creek and it made no provision for floods; however it may be argued that the effect would, probably, have been to protect against them. No absolute duty appears to have been enjoined by statute upon the municipality with respect to the creek; nor was any created by an assumption of the undertaking to control and to restrain, under all circumstances, its waters. The creek had been, from early times, the natural drainage outlet for the territory and it became such for the city upon its banks. The right of the city to make use of it for that purpose is beyond question; whether from long use by the community, or from legislative recognition. The situation, and instances in its history, sufficiently, advised the inhabitants of the menace from an overflow of the stream, through the inability to carry off in its channel any extraordinary quantity of waters precipitated by melting snows, or excessive rains. But, aside from the plainly discretionary nature of the powers vested in the municipal government, with respect to the subject, the exercise of those powers was fraught with many obvious difficulties. It

was confronted with a serious problem in a situation, not created by its own acts, but by nature. If the difficulty could be met and danger could be averted, the duty of corporate action was one calling for the exercise of deliberate judgment and discretion.

The question of municipal responsibility for insufficient, or for defective, sewerage, has been, not infrequently, the subject of discussion in the decisions of this court and the reasoning in some of the cases is not without its pertinence. In *Mills* v. *City of Brooklyn*, (32 N. Y. 495), the complaint was for the insufficiency of the sewer to carry off the water from the streets; in consequence of which the plaintiffs' premises were flooded and their building was injured. In deciding adversely to the claim of the plaintiffs for damages, it was held that "the duty of draining the streets and avenues of a city, or village, is one requiring the exercise of deliberation, judgment and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequences of water falling from the clouds upon it. The duty is * * * of a judicial nature; for it requires the qualities of deliberation and judgment. It admits of a choice of means and of the determination of the order of time in which improvements shall be made." Again, it was said, "It may, therefore, be laid down as a very clear proposition, that if no sewer had been constructed at the locality referred to, an action would not lie against the corporation, though the jury should find that one was necessary." In *Seifert* v. *City of Brooklyn*, (101 N. Y. 136), the plaintiff recovered the damages, which had been occasioned by inundations of the district of his residence, through a defective construction of the sewers. In the opinion, the cases were reviewed and the principle of the immunity of municipal corporations from liability for damages occasioned, either by an insufficiency of the plan of an improvement, or by the neglect to exercise the power to make desired improvements, was asserted. In that case, the liability of the defendant was upheld, upon the ground

that its acts had resulted in the creation of a nuisance. It was observed that "while the corporation was under no original obligation to the plaintiff, or other citizens, to build a sewer, at the time and in the manner it did, yet, having exercised the power to do so and thereby created a nuisance on his premises, it incurred a duty, having created the necessity of its exercise, and having the power to perform it, of adopting and executing such measures as should abate the nuisance and obviate the damage." In *Byrnes* v. *City of Cohoes*, (67 N. Y. 204), the plaintiff's property had been damaged by a flood of water, collected from the streets, which, but for the curbing and guttering, would have passed away in a natural watercourse. It was held that "the cases * * * to the effect that a municipal corporation is not liable for an omission to supply drainage, or sewerage, do not apply to a case, where the necessity for the drainage, or outlet, is caused by the act of the corporation itself."

It seems to me to be very clear, therefore, that the omission of the municipal authorities of the city of Syracuse to make provision for obviating the danger of an overflow of the creek was not the neglect of an absolute duty, which made the corporation liable for the damages of which the plaintiff complains. Assuming that there was a duty, which could have been effectively performed, and assuming that the municipality had the control, neither reason, nor authority, supports the contention that the failure to exercise the governmental power of acting upon a matter, not relating to some special interest, nor to some undertaking assumed, nor commanded by any legislative enactment, imposed a responsibility upon the corporation for what might happen injuriously to the citizens through the occurrence of an extraordinary flood. In *Cain* v. *Syracuse*, (*supra*), it was said, with respect to the failure of the common council to exercise the power to direct the tearing down of a wall, which had been made dangerous by a fire and from the fall of which the plaintiff's intestate had been killed, that, assuming the power existed, "did a duty result so absolute, certain and imperative, as to found a

right of action upon the omission? We must consider the nature and scope of the duty and, in so doing, must not be misled by the test, which makes permissive words absolute and a command. That test * * * will not serve to make a duty, which is inevitably and inherently discretionary, nevertheless, ministerial, because the public have an interest in its exercise, or the rights of individuals may be affected by it." In this case, the power may be conceded to have existed in the common council to have ordered works, or to have put into execution plans, for averting the possible recurrence of freshets and floods; but it did not act, whether from inability to devise any satisfactory plan, or for any other reason, is immaterial, and its non-action, like that of the state legislative body, could create no cause of action. The plaintiff and the other citizens affected by the flood were no worse off than they would have been if the creek had not been used at all for sewerage purposes, except for the incidental deposit of sewage matter. The drainage of sewers into the channel, however, did not cause the flood, although, naturally, contributing to the volume of the stream. The flood was an extraordinary and an unusual one, resulting from the natural causes of the action of the elements and of the lay of the land.

I have given my reasons, at some length, in view of the importance of the case, not only in its possible bearing upon other damage cases, but in the application of the principle of municipal liability in such cases, and I advise that the judgment appealed from should be reversed and that a new trial should be ordered; the costs to abide the event.

CULLEN, Ch. J., O'BRIEN, HAIGHT and VANN, JJ., concur; EDWARD T. BARTLETT and WERNER, JJ., dissent.

Judgment reversed, etc.

ELI P. MILLER et al., Respondents, *v.* THE EDISON ELECTRIC ILLUMINATING COMPANY OF NEW YORK, Appellant.

1. EQUITY — WHEN COURT UPON DENIAL OF EQUITABLE RELIEF, MAY RETAIN JURISDICTION AND DETERMINE WHETHER DAMAGES SHOULD BE AWARDED. A court of equity, which has obtained jurisdiction of an action brought by a land owner to restrain the continuance of a nuisance, and for damages, alleged to be caused by the maintenance and operation of a plant for the production of electric light and power, may retain the case, although it is found that the nuisance was abated at the time of the trial and that it was improbable that any would be created in the future, and may determine whether the plaintiff is entitled to any damages.

2. RIGHT TO TRIAL BY JURY. The denial of equitable relief in an action brought to restrain the continuance of a nuisance and to recover the damages sustained, does not make the action triable, as of right, by a jury.

3. LANDLORD AND TENANT — INJURY TO ENJOYMENT AND OCCUPATION OF LEASED PREMISES — TENANT, NOT LANDLORD, MAY RECOVER DAMAGES THEREFOR. Where it appears, upon the trial of an action to restrain a nuisance and for damages caused thereby, that the alleged nuisance was caused by the maintenance and operation of an electric light and power plant by the defendant; that, after the erection of such plant, the plaintiff's premises were leased for a term of years; that, at the expiration of such term, they were leased to the same tenant for another term at a reduced rent; that, at the expiration of this term, they were again leased to the same tenant and at a still lower rent; and it is found by the trial court that, as the electric plant was operated at the time of the trial, no injury was being done to plaintiff's premises and that none was likely to be done in the future; that no damage was suffered by the plaintiff after the beginning of the last lease and although the rental reserved in that lease was less than that for the preceding lease, the difference could be accounted for otherwise than by charging it to the defendant's acts, so that, in effect, the only injury which had been caused by the operation of the electric plant was to the enjoyment and occupation of plaintiffs' premises and was not of a permanent character, — the plaintiffs cannot recover for any depreciation in the rental value, since a tenant under a lease, made during the existence of a nuisance, is entitled to recover the depreciation of the value of the occupation of the premises, and the defendant cannot be subjected to a double recovery for the same injury.

Miller v. *Edison El. Illuminating Co.*, 97 App. Div. 638, reversed.

(Submitted December 12, 1905; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

October 29, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The plaintiffs, by the institution of this action, have sought to restrain the defendant from continuing a nuisance, created through the maintenance and operation of a plant for the supply of electric light and power, whereby their property in neighboring dwelling houses has been injuriously affected. They, further, demanded judgment for damages already sustained. The property was in the occupancy of a tenant, holding under a lease by the plaintiffs. The trial court formulated its decision in findings of facts and conclusions of law, and the judgment recovered by the plaintiffs thereupon was affirmed by the Appellate Division. The facts found, so far as they need to be mentioned, show that the plaintiffs became the owners of the premises in question some years prior to 1888; in which year the defendant constructed, upon premises adjacent to those of the plaintiffs, a power house, equipped with machinery and appliances necessary for the purpose of generating electricity to be supplied to the public for lighting, or for power. In 1890, the plaintiffs leased their property for a term of five years; receiving a rental of $15,000 a year and certain privileges. Shortly prior to the expiration of the term of this lease, the premises were again leased to the same tenant for another term of five years from May 1, 1895, at the rental of $12,000 a year, with the reservation of the same privileges as in the previous lease. In 1900, the premises were, again, leased at a less rental, with the reservation of some additional privileges, and with a right to the lessors to share in the profits of the hotel business conducted by the lessee. After the construction of its power house, the defendant's operations caused "soot, cinders, ashes, steam, or water condensing from steam," to be discharged upon plaintiffs' premises. Noises, jars and vibrations resulted from the operation of the machinery, which impaired the peaceful enjoyment of the premises and affected their rental value. The court, further, found that, as the machinery was used at the time of the trial, no injury was being worked to the plaintiffs' property

and "that it was improbable that it would be so used as to work injury in the future;" but that, as the plaintiffs were entitled to the equitable relief prayed for when the action was commenced, the court would retain the case and award to them their damages. Judgment was directed for the plaintiffs for such damages, in the amount of $4,500. The court decided that the plaintiffs failed to establish that they suffered any damage after the year 1900 and, though the rental for the premises, reserved to them in the new lease of that year, was less than that for the prior term, the difference could be accounted for otherwise than by charging it to the defendant's acts. This was explained, in the changed character of the locality and in the fact that the lease, not only, provided that the plaintiffs should have a share of the profits, but that they should enjoy greater privileges than formerly. These findings of the trial court have sufficient support in the evidence.

Samuel A. Beardsley and *Henry J. Hemmens* for appellant. The damages caused by the alleged nuisance, if any, were temporary in their nature and belong to the tenant and not to the landlord. (*Bly* v. *E. E. T. Co.*, 172 N. Y. 1; *Bates* v. *Holbrook*, 89 App. Div. 548; *Pritchard* v. *E. E. T. Co.*, 179 N. Y. 364; *Francis* v. *Schoelkopp*, 53 N. Y. 152; *Hine* v. *N. Y. E. R. R. Co.*, 128 N. Y. 571.) The court below found that the evidence did not warrant equitable relief. The complaint, therefore, should have been dismissed. (*Peck* v. *Goodberlett*, 109 N. Y. 180.) The motion to strike the case from the Special Term calendar and send it to a jury for trial should have been granted for the reason that the plaintiffs were not entitled to an injunction at the time of the trial, and the defendant was entitled to a trial by jury as a matter of right on the question of damages. *M(cNulty* v. *M. M. E. L. Co.*, 172 N. Y. 410; *Tucker* v. *E. E. Il. Co.* 100 App. Div. 407; *Miller* v. *E. E. Il. Co.*, 78 App. Div. 390; *Hudson* v. *Caryl*, 44 N. Y. 552; *Coyswell* v. *N. Y., N. H. & H. R. R. Co.*, 105 N. Y. 319; *Dorr* v. *D. L. Co.*, 18 Hun, 274; *People* v. *M. T. Co.*, 31 Hun, 596; *Lefrois* v.

County of Monroe, 88 Hun, 109; *Bohan* v. *P. J. G. L. Co.*, 122 N. Y. 18; *Parker* v. *Laney*, 58 N. Y. 469.)

Frank M. Hardenbrook for respondents. The damages awarded belonged properly to the plaintiffs. (*Kernochan* v. *M. Ry. Co.*, 161 N. Y. 345; *Hine* v. *N. Y. E. R. R. Co.*, 128 N. Y. 574.) The Special Term had jurisdiction to try the action. (*Miller* v. *E. E. Il. Co.*, 78 App. Div. 390; *Crane* v. *Bennett*, 177 N. Y. 111; *Stokes* v. *Stokes*, 155 N. Y. 581; *Roberson* v. *R. F. B. Co.*, 171 N. Y. 538; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 105 N. Y. 319; *Lynch* v. *El. R. R. Co.*, 129 N. Y. 274.)

CULLEN, Ch. J. I adopt Judge GRAY'S statement of facts and I agree with him in the position that this action was properly brought in equity; that it was triable by the court, and that the defendant was not entitled to a jury trial as of right. I am unable, however, to concur in the view that the plaintiffs were properly awarded damages for diminution in the rental value of the property. The plaintiffs were in possession of the premises during no part of the period for which damages have been recovered, but the same were in the occupation of their tenants under a lease for a term of years. One of these leases expired during the existence of the nuisance, and, as the trial court has found, by reason of the nuisance the plaintiffs were compelled to rent the premises for a new term at a reduced rent. It is for this loss of rent that damages have been awarded. The question as to which party, the landlord or his tenant, is entitled to recover for depreciation of the rental value by the existence of a nuisance has involved the courts in much perplexity. In the elevated railroad cases it has been settled that in the case of a lease made after the erection and operation of the railroad the landlord, not the tenant, is entitled to recover for such depreciation. (*Kernochan* v. *N. Y. Elevated R. R. Co.*, 128 N. Y. 559.) In the *Kernochan* case there is an elaborate discussion of the question by Chief Judge ANDREWS. A careful analysis of

the opinion of the learned judge will show that the decision proceeded on the ground that the elevated road was a permanent structure and intended to be so maintained; that it was constructed in the street under legislative authority, and that as ample authority was granted to condemn any property rights on which it might trespass, the lessor had "no absolute remedy to compel the removal of the structure, since the right of condemnation can at any time be exercised by the defendants." The learned judge said: "It is also a necessary deduction from the circumstances attending the making of ordinary leases of improved property, executed after the construction of the elevated railroad, that the right to recover damages is vested exclusively in the lessor." To the doctrine of that case the court has steadily adhered. When, however, the doctrine was invoked to defeat the right of a tenant to recover damages against the present defendant for the very same acts which constitute a nuisance in the case now before us, it was held that the rule in the elevated railroad cases did not apply. In *Bly* v. *Edison Electric Ill. Co.*, a tenant, hiring after the nuisance was created, recovered the depreciation in the rental value of the premises. The Appellate Division, citing the authority of the *Kernochan* case, reduced the award to a nominal sum, holding that the tenant was not entitled to recover diminution in rental value. (54 App. Div. 427.) On appeal to this court the judgment of the Appellate Division was reversed, though a new trial was ordered because the trial court had awarded damages for a period anterior to six years before the commencement of the action. (172 N. Y. 1.) This court said, per WERNER, J.: "We think the *Kernochan* case has no application to a case like the one at bar, and this without reference to the fact that it appears affirmatively that the rental paid by the plaintiff was the same during the existence of the nuisance as it was before. The elevated railroad cases, to which class the *Kernochan* case belongs, are *sui generis*. They are governed by principles which apply to no other class of cases." The elaborate discussion of the question by Judge WERNER leaves nothing to

be now added. It is sufficient to say that that case expressly held that a tenant under a lease made during the existence of the nuisance was entitled to recover the depreciation of the value of the occupation of the premises.

It is said to be the settled rule of law "that where the wrongful act affects different interests in the same property the owner of each interest may have his separate action against the wrongdoer. Landlord and tenant have separate assets, and each, if injured therein, may have redress, the one for the injury to the reversion, the other for the injury inflicted in diminishing his enjoyment of the premises." This statement is doubtless correct, but under this rule "to entitle a reversioner to maintain an action, the injury must be necessarily of a permanent character, and that a presumed intention to continue the nuisance is not sufficient, even where there is evidence that the premises would sell for less if the nuisance were continued." (*Mott* v. *Shoolbred*, opinion of Sir GEORGE JESSEL, M. R., L. R. [20 Eq. Cas.] 22; see also cases cited in Judge WERNER'S opinion.) Here the only injury found by the trial court is to the enjoyment and occupation of the premises. That does not affect the reversioner. Had the trial court found that the operation of defendant's light plant cracked the walls or injured the structure, such damage would be of a permanent character and the reversioner entitled to recover. In the present case, however, not only is there no permanent injury to the plaintiffs' buildings, but the defendant's plant did not constitute the nuisance, but its operation, and such operation was not necessarily or inherently injurious because the trial court found that at the time of the trial its operation did not damage the plaintiffs. Judge ANDREWS said in the *Kernochan* case: "We should be very reluctant to make a decision which would expose the defendants to a double action in cases like this," and I imagine that the reluctance still continues. Nevertheless if the judgment before us is affirmed the defendant will be subjected to a double recovery against it, for under the *Bly* case the tenant is also entitled to recover, if in fact he has not already recovered, the diminu-

tion in the rental value during the same period for which the plaintiffs are awarded damages for such diminution. It is not a case like that suggested where the same act has caused injury to different persons and each recovers for the injury to himself; but here two parties will recover for exactly the same injury. I may suggest this further distinction between the elevated railroad cases and that of a casual temporary nuisance. In the *Kernochan* case the defendant upon satisfactorily compensating the landlord could continue the operation of its road despite the complaint of the tenant. Here, no release from, or settlement with, the landlord could have prevented the tenant from restraining the operation of the defendant's plant. Moreover, the lease by the plaintiffs was for a term of years. The right of the tenant and landlord then became fixed and the damage to the plaintiffs at once. It was the diminished rent during the demised term. Had the defendant ceased the operation of its plant the day after the lease, the plaintiffs' injury would have been as great as if it had maintained the operation during the whole demised term. Yet I apprehend no one will contend that the defendant would have been liable for the whole period. But if we should assume that such a contention would be well founded the result would be that the day after the lease the operation of the plant might be stopped at the suit of the tenant and yet the defendant remain liable to the landlord for the loss of rent for the whole term of the lease. In other words the defendant's liability would depend not on the injury done by its trespass or nuisance, but on the manner in which the owner might deal with his property. The decision in the *Bly* case did not pass this court without discussion. On the contrary there was a vigorous dissent by Judge HAIGHT (concurred in by two other members of the court), who contended that the loss in rental value went to the landlord, not to the tenant. The force of this position was appreciated by the majority of the court which, when it decided that the tenant could recover for that loss, substantially decided that the landlord could not.

I think the judgment should be reversed and a new trial granted, costs to abide event.

GRAY, J. (dissenting). In my opinion, the right of the plaintiffs to bring and maintain this action is clear and the defendant's appeal should not be sustained. The plaintiffs were shown to have been injured by the defendant's acts, in the depreciation of the value of the property, as shown by the diminished amount of the rent for the premises reserved by the lease of 1895. For the prior term of five years from 1890, they had been receiving $15,000 a year as rent; while, for the succeeding term of five years from 1895, they were to receive only $12,000 a year. That represented a total loss to the owner of $15,000 for the new term and furnished a basis of injury, upon which this action was commenced in 1898.

I consider it to be a settled rule of law that, where the wrongful act affects different interests in the same property, the owner of each interest may have his separate action against the wrongdoer. Lessor and tenant have separate estates and each, if injured therein, may have redress; the one for the injury to the reversion, the other for the injury inflicted in diminishing his enjoyment of the premises. This rule and its reason have been, heretofore, discussed with such care, that I deem it necessary, only, to refer to the recent cases of *Kernochan* v. *N. Y. Elevated R. R. Co.*, (128 N. Y. 559), *Hine* v. *Same*, (Ib. 571), *Kernochan* v. *Manhattan Ry. Co.*, (161 ib. 345), and *Bly* v. *Edison Electric Ill. Co.*, (172 ib. 1). If it be a nuisance, which is the subject of complaint as injuring adjacent property interests, the question is, when the owner not in possession sues, whether it has diminished the rental value of his property; the difference in that respect being the measure of his right to damages. When the tenant sues, his right to recover rests upon the ground that his occupancy is disturbed and the full enjoyment of his possession of the premises is prevented by the common nuisance. (*Francis* v. *Schoellkopf*, 53 N. Y. 152; *Hine* v. *N. Y. Elev. R. R. Co.*, *supra*; *Bly* v. *Edison Electric*

Ill. Co., supra.) In the *Bly* case the question discussed was that of the tenant's right to maintain an action to abate a nuisance and for damages, when in under a lease made during the existence of the nuisance. It was held, upon a careful review of the authorities, in effect, that, as there was no justification for the maintenance of that which was a nuisance and, hence, an unreasonable and a wrongful use by the defendant of its property, the tenant of the property injuriously affected was not deprived of the right to bring an action by reason of having acquired the lease thereof, during the existence of the nuisance, at a diminished rental. The right to have compensation for injuries actually sustained and to have the nuisance abated could not thereby be affected. It was upon that proposition that the judges of this court divided in opinion. As to the right of the owner of property, though not in possession, to maintain an action to restrain the continuance of a nuisance, which threatens injury to his reversionary rights, and to recover for any damage which he may be able to show that he has already sustained in that respect, I think there should be no doubt. It is argued that, as the nuisance arises from the method of defendant's operation of the power house, presumptively, it is but casual and temporary. That is to say, though the defendant's building and mechanical plant were permanent structures, the operation of the machinery in a way intolerable and injurious to others, as complained of, would not be presumed to continue. Assuming the correctness of the proposition, how does it affect the principle upon which the legal right of the plaintiffs was founded? They, certainly, had the right to protect their reversionary interest against injury. A casual, or temporary, trespass, or nuisance, if the latter is of a casual nature, it is true, usually affects the possession of the property and, therefore, gives a right of action to the lessee. But for a wrongful act, which diminishes the rental value of the property, and which, from the circumstances, may, fairly, be regarded as likely to continue, whether it be in the nature of a trespass, or of a nuisance, an action will lie by a reversioner to redress the wrong; although

the lessee may, equally, have his action to redress the wrong inflicted upon his right to peaceable and comfortable possession. (See *Kernochan Case*, 128 N. Y. 559, 566, and the English cases cited in the opinion; as well as the *Bly Case*, *supra*.) In this case the rental value of the plaintiffs' property, when the second lease was made in 1895, was diminished to the extent of $3,000 a year, under conditions of lease similar to those of the preceding, and, according to the findings of the trial court, the damage to the plaintiffs from defendant's operations, only, ceased to be inflicted in 1900. Thus, the defendant's use of its power house, in a way injurious to others, had continued for many years after its construction. It had so seriously affected the rental value of the plaintiffs' property as to compel them to accept a reduced rental in 1895 for a further term and when this action was commenced, in 1898, the threat in the situation was the same. However, technically, the nuisance may be termed casual, as caused by the methods of the defendant in operating its power house, it was a very real menace to the plaintiffs' interests as property owners. The case, in my judgment, came within the established rule which allows an action to a lessor, whose reversion is injuriously affected, to abate the nuisance, by restraining its continuance. To say that the nuisance was a casual, or a temporary, one is an answer no more satisfactory, than it is complete, legally, to the statement of the owners that they had suffered injury in the past by its maintenance and would suffer in the future unless it was restrained.

It is, further, argued that as the plaintiffs failed to make good their ground to equitable relief, by proving that the nuisance continued to exist at the time of the trial, the court should not have retained the action, but should have dismissed the complaint. It is, however, well settled that when a court of equity has gained jurisdiction of a cause, its jurisdiction is not affected by subsequent changes in the situation of the parties, if any cause of action survives; it may retain the case generally to do complete justice between them, by awarding that measure of relief for the injury done which

the case admits. The jurisdiction depended upon the situation at the commencement of the suit, with respect to the right to equitable procedure and relief; but the measure of the relief would be regulated by the situation at the time of pronouncing the decree. (*Lynch* v. *Metr. E. R. Co.*, 129 N. Y. 274; *Van Allen* v. *N. Y. El. R. R. Co.*, 144 ib. 174; *Van Rensselaer* v. *Van Rensselaer*, 113 ib. 207; *Madison Av. Baptist Church* v. *Oliver Street Baptist Church*, 73 ib. 82.) The trial court, therefore, committed no error in retaining the cause for the purpose of awarding damages.

Nor was the action triable, as of right, by a jury. It was not originally; nor was it so upon the denial of the equitable relief. The Code provides for a jury trial where the action is, simply, for a nuisance, (§ 968); but this action was brought for equitable relief to restrain the continuance of a nuisance, as well as to recover the damages occasioned. It was like the action of *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, (105 N. Y. 319); where the distinction was pointed out between a common-law action for damages and the abatement of the nuisance, as in *Hudson* v. *Caryl*, (44 N. Y. 553), and an action where relief by way of injunction was asked.

This case is materially different from that of *McNulty* v. *Mt. Morris El. Light Co.*, (172 N. Y. 410); for, there, the plaintiff, after the commencement of his action and before the trial, had ceased to be a tenant of the premises and had removed therefrom. Hence, when the trial came on, he had no interest, or estate, in the premises, as to which he was entitled to ask for any equitable relief. He had no ground upon which to demand of the court anything but a judgment for the damages, which he had sustained from the nuisance complained of while he had been a tenant. As Judge PARKER observed, in the prevailing opinion in that case, "before the cause was reached for trial, plaintiff had passed out of possession of the property, thus parting with the right to the injunction and there remained to him only his claim for damages." In this case the plaintiffs had, in no sense, changed their position. They came to the trial with their demand for an injunction based

upon evidence, showing that the further lease, made in 1900 for a term of five years, was for a lesser rental; that the defendant's building still stood there, with all its powerful machinery, and that jarring and vibration still existed, though not as frequently as had previously been the case. With the plant there, as a permanent structure and with capacity to injure the tenants of adjacent dwellings, the plaintiffs had the right to insist upon their apprehensions of injury to the rental value of their property, unless the acts complained of were permanently restrained. The trial court, however, would not take that view of the evidence and decided that "it was improbable that it, (the power house), would be so used as to work injury in the future, except, perhaps, in case of emergency and then only for a limited time." I do not think the court could, justly, say of the case that it had been shorn of all its equitable features, (as said in *McNulty's Case*, *supra*), before the trial. Upon the evidence, the plaintiffs were deemed by the court to have failed in establishing their right to restrain the defendant from continuing the operations as then conducted. I conclude, therefore, upon this point that there was no error committed by the trial court in holding the case for its judgment as to the relief which the plaintiffs should be awarded, whether equitable, or, simply, in a pecuniary compensation.

A further question is presented with respect to the damages. The trial court awarded the sum of $4,500 for the damages sustained from a date six years prior to the commencement of the action down to the date of the trial. When the action was commenced, in 1898, the plaintiffs had submitted to a definite loss, upon the renewal of their lease, in 1895, for a term of five years, amounting to $3,000 a year, or to $15,000 for the whole period. Prior to 1895, they were receiving the rental value of their property under the lease of 1890. It was erroneous, therefore, to award damages for the period antedating the making of the new lease of 1895. Then, only, a loss was first sustained, so far as the record shows, which was recoverable, in the diminished value of the prop-

erty due, according to the evidence, to the effects of the defendant's operation of its power house upon these dwellings and their occupants. The amount allowed by the trial court was less than one-third of the actual depreciation in rental value for the term of five years from 1895 to 1900. The Appellate Division, in affirming the judgment, have said in the opinion, with respect to these damages, that they regarded the case as one where it was possible "to separate the damage allowable from that for which a recovery could not be had," and I think they were right. While the exercise of our jurisdiction to grant to a party such judgment as he may be entitled to, (Code, § 1337), is to be exercised upon the facts found by the court below, I think it is well exercised in this case in the affirmance of the judgment, for the same reason that moved the Appellate Division justices. The findings of fact plainly state that nothing was awarded to the plaintiffs for any damage after the year 1900. They show, equally clearly, that the only damage they had sustained before the commencement of the action was in the re-leasing of their property, in the year 1895, at a depreciation of $15,000 for the whole term of the lease. They, also, show that the moderate award was due to the trial judge's conviction that the depreciation in the rental value, generally, was somewhat influenced by other considerations. Therefore, his finding as to the period wherein damages were recoverable was purely formal and, clearly, inadvertent in its formulation, in view of his previous findings of fact. There should be no difficulty in affirming this judgment, when the recovery was so far within the distinct depreciation of the rental value as shown by the facts found.

For these reasons, I advise the affirmance of the judgment.

O'BRIEN, VANN and WERNER, JJ., concur with CULLEN, Ch. J.; EDWARD T. BARTLETT and HAIGHT, JJ., concur with GRAY, J.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ABRAHAM H. HUMMEL, Appellant, *v.* TRIAL TERM, PART I (CRIMINAL BRANCH), OF THE SUPREME COURT IN AND FOR THE COUNTY OF NEW YORK et al., Respondents.

1. WRIT OF PROHIBITION. A writ of prohibition lies only where the grievance cannot be redressed by ordinary proceedings at law or in equity or by appeal.

2. ORDER DENYING MOTION TO QUASH INDICTMENT APPEALABLE — CODE CR. PRO. §§ 485, 517. A motion to dismiss an indictment, although not specifically mentioned in section 485 of the Code of Criminal Procedure, is embraced in the general provisions thereof and is included in and becomes a part of the judgment roll; an order of the trial judge denying such a motion, made upon the ground that the defendant had been compelled to testify against himself before the grand jury, is under section 517 reviewable by the Appellate Division, and under section 519, subdivision 3, by the Court of Appeals; the defendant, therefore, having a complete remedy by appeal, is not entitled to a writ prohibiting the judge from further proceeding with the trial.

People ex rel. Hummel v. *Davy*, 105 App. Div. 598, affirmed.

(Argued January 8, 1906; decided February 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 26, 1905, denying the relator's application for an absolute writ of prohibition to restrain the prosecution of certain criminal proceedings against him and quashing an alternative writ which had been previously issued.

The facts, so far as material, are stated in the opinion.

John D. Lindsay and *Delancy Nicoll* for appellant. Prohibition will lie to restrain proceedings under indictments found upon evidence extorted from the person accused in violation of the rights secured to him by the Constitution. (*People* v. *Rutherford*, 47 App. Div. 209; *People ex rel. Sandman* v. *Tuthill*, 79 App. Div. 24; *People ex rel. Toy* v. *Maher*, 71 Hun, 82; *People ex rel. Hess* v. *Inman*, 74 Hun, 130; *People ex rel. Higgins* v. *McAdam*, 22 Hun, 559; *People ex rel. Sprague* v. *Fitzgerald*, 15 App. Div. 539;

T. C. Co. v. *Doolittle*, 54 W. Va. 210; *People ex rel. Burbank* v. *Wood*, 21 App. Div. 245; *People* v. *Sexton*, 40 Misc. Rep. 315; *People* v. *Dumar*, 106 N. Y. 502.)

William Travers Jerome, *District Attorney* (*Howard S. Gans* of counsel) for respondent. Even assuming that it were a violation of the defendant's rights to have called him before the grand jury which found the indictment against him, a writ of prohibition would not lie. (*People ex rel. Patrick* v. *Fitzgerald*, 73 App. Div. 339; *People ex rel. Adams* v. *Westbrook*, 89 N. Y. 152; *Quimbo* v. *People*, 20 N. Y. 531; *People ex rel. Mayor* v. *Nichols*, 79 N. Y. 582; *People ex rel. Deal* v. *Williams*, 51 App. Div. 102; *People ex rel. Jones* v. *Sherman*, 66 App. Div. 231; *People ex rel. Burbank* v. *Wood*, 21 App. Div. 245.)

HAIGHT, J. The grand jury of the Court of General Sessions of the Peace held in and for the county of New York had found two indictments against the relator, charging him with the crime of subornation of perjury. These indictments had been transferred to the criminal branch of the Supreme Court which was held by Justice DAVY, before whom the district attorney contemplated the trial of the charges. Thereupon the defendant moved the court for an order quashing the indictments upon the ground that he had been compelled to testify against himself before the grand jury. This motion was denied and then the relator procured an alternative writ prohibiting the justice from proceeding with the trial until the further order of the Appellate Division. Subsequently the matter was brought to a hearing before that court, resulting in an order denying the relator's application for an absolute writ of prohibition, as a matter of law, and not in the exercise of discretion, and the quashing of the alternative writ.

The writ of prohibition is one of the state writs authorized by the Code of Civil Procedure, which may issue out of the Supreme Court restraining a judge or party from further

proceeding in the action or special proceeding complained of. (Code Civ. Pro. §§ 2091–2096.) The writ does not issue as a matter of right, but only in the sound discretion of the court in cases of supreme necessity where the grievance cannot be redressed by ordinary proceedings at law or in equity or by appeal. (*People ex rel. Adams* v. *Westbrook*, 89 N. Y. 152; *People ex rel. Burbank* v. *Wood*, 21 App. Div. 245; *People ex rel. Mayor* v. *Nichols*, 79 N. Y. 582, 591; *Alexander* v. *Crollott*, 199 U. S. 580.) We are thus brought to the consideration of the question as to whether the relator had a remedy for his grievance by ordinary proceedings either at law or in equity or by appeal. We think he did, and that he availed himself of the remedy when he moved in the action for a quashing or a dismissal of the indictments. This motion was based upon affidavits and the minutes of the grand jury so that all of the merits were fully brought before the court for determination. The Code of Criminal Procedure provides that "hereafter, the only mode of reviewing a judgment or order in a criminal action or proceeding or special proceeding of a criminal nature is by appeal." (§ 515.) An appeal to the Supreme Court may be taken by the defendant from the judgment on a conviction after indictment, and upon the appeal any actual decision of the court in any intermediate order or proceeding forming a part of the judgment roll, as prescribed by section 485, may be reviewed. (§ 517.) The indictments, as we have seen, had been found and returned to the court by the grand jury. The criminal actions were, therefore, pending. The motions made to dismiss the indictments were motions in the actions and necessarily appear upon the minutes of the court, required to be kept by the clerk. Section 485 provides that the judgment roll must consist of the following papers: "1. A copy of the minutes of a challenge interposed by the defendant to a grand juror, and the proceedings and decision thereon. 2. The indictment and a copy of the minutes of the plea or demurrer. 3. A copy of the minutes of a challenge, which may have been interposed to the panel of the trial jury, or

to a juror who participated in the verdict, and the proceedings and decision thereon. 4. A copy of the minutes of the trial. 5. A copy of the minutes of the judgment. 6. A copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment. 7. *The case,* if there is one." While a motion to dismiss an indictment is not specifically mentioned in the provisions of this section, yet we are clearly of the opinion that it is embraced in the general provisions thereof and is included and becomes a part of the judgment roll. It would necessarily appear, in the case, under subdivision 7 of the section and also as a part of the minutes of the trial under subdivision 4. The ruling thereon is, therefore, under section 517 reviewable by the Appellate Division, and the determination of that court may be reviewed by an appeal to this court under section 519, subdivision 3, which authorizes us to review a final determination of the Appellate Division affecting a substantial right of the defendant. So far as the questions of practice are concerned this case is very similar to that of *People* v. *Glen* (173 N. Y. 395). In that case a motion was made to dismiss the indictment and the motion was denied. In that case we held that the defendant had not only the right to make the motion but that he was entitled to have it reviewed, and we did review the questions involved in that case upon the merits.

It follows, therefore, that the relator has a complete remedy under the Code for the grievance complained of and that he has availed himself of such remedy; that the review of the rulings made thereon is by appeal and not by writ of prohibition.

The order of the Appellate Division should be affirmed.

O'BRIEN, J. (dissenting). The relator Hummel was indicted by the grand jury for subornation of perjury. Upon the investigation before the grand jury which resulted in the indictment he was subpœnaed as a witness by the district attorney and compelled to testify against himself. After the

indictment was found he made a motion to the court before which the trial was to be had to set aside the indictment, on the ground that his constitutional rights had been violated in compelling him to attend and testify as a witness. The motion was denied, and he thereupon applied for a writ of prohibition restraining the court from proceeding with the trial of the indictment, and no trial has yet been had.

There is no dispute about the facts. They are admitted upon the record by the return. They were practically conceded by the learned court below and they are admitted in the briefs of counsel in this court. The court below was divided upon the question. All seem to have agreed that the constitutional rights of the relator were violated, but the majority of the court were of the opinion that a writ of prohibition would not lie, for the reason that the relator had another remedy, and that was by an appeal from the order denying the motion to set aside the indictment. That view is sustained by the prevailing opinion in this court and no other question is considered.

The proposition to be decided is that an appeal lies from an order of the trial court refusing to set aside an indictment on the ground of misconduct or illegal action before the grand jury finding the indictment, and having this right of appeal, the relator was not entitled to the writ of prohibition. I think that this proposition is plainly erroneous, and what I have to say in this opinion will be directed solely to prove that it is.

The right of appeal from a judgment or order in a criminal case is statutory only, and in the absence of a statute expressly authorizing an appeal in a given case, no appeal can be taken. (*People* v. *Trezza*, 128 N. Y. 529; *People* v. *Palmer*, 109 id. 413, 418; *People ex rel. Commrs.* v. *Cullen*, 151 id. 54, 56; *People* v. *Priori*, 163 id. 99, 107; *People* v. *Dempsey*, 31 Hun, 526, 528.) No statute or adjudication can be found authorizing an appeal from an order denying a motion to set aside an indictment. By section 517 of the Code of Criminal Procedure an appeal may be taken in connection

with the appeal from the final judgment from any actual decision of the court in an *intermediate* order or proceeding forming a part of the judgment roll, as prescribed in section 485. An order refusing to set aside an indictment for misconduct of the grand jury is not an intermediate order and such an order is no part of the judgment roll as prescribed in section 485. So the order in question cannot be the subject of appeal under that section.

Turning to section 485 the papers which are to go into and constitute the judgment roll are specified and enumerated. But an order made before the trial on a motion to set aside the indictment, such as that with which we are now concerned, is not among the papers designated and enumerated. It is said, however, that *the case*, if there is one, may be included in the judgment roll and form a part of it; but just how this order in question could be incorporated in the case is not pointed out or explained. Turning to section 458 we find that the case is to contain "so much of the evidence, and other proceedings *upon the trial*, as is material to the questions to be raised thereby, and also the exceptions taken by the parties making the case." The order in question is no part of the evidence or proceedings upon the trial. That is very clear, and if the relator should attempt to incorporate such an order in the case it would be stricken out on the motion of the district attorney. Hence it seems to me to be very clear that no method is provided for reviewing in any court an order denying a motion to set aside an indictment.

A motion in arrest of judgment clearly does not bring up for review any such order. What may be urged on a motion in arrest of judgment is specified in section 331, and is confined to defects appearing on the face of the indictment. The case of *People* v. *Glen* (173 N. Y. 395) does not in the least help the contention that the order in question is appealable. The right of appeal from such an order was not at all involved in that case. There was no appeal from any order refusing to set aside the indictment, either as an independent proceeding or in connection with the judgment. The ques-

tion of the right of the accused to make such a motion was involved, but the right to appeal from the order was not. The conclusion seems to be irresistible that the relator had no right to appeal from the order denying the motion to set aside the indictment, and hence the refusal of the court to grant the writ of prohibition was based upon grounds wholly untenable. If, however, I am wrong in this conclusion, it ought not to be very difficult to point out and expose the error; but I fail to find anything in the prevailing opinion or in the briefs of counsel pointing out the statute or authorities under which an appeal may be had. So I am in favor of reversing the order and granting the writ, as the relator is without any other remedy either by appeal, motion or otherwise.

CULLEN, Ch. J., WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur with HAIGHT, J.; VANN, J., concurs with O'BRIEN, J.

Order affirmed.

In the Matter of the Accounting of ELLA S. THOMPSON, as Executrix of FRANCIS A. THOMPSON, Deceased.

ELLA S. THOMPSON, Individually and as Executrix, Appellant; CHARLES A. BRYAN, Respondent.

SURROGATE HAS NO JURISDICTION TO ENFORCE CREDITOR'S LIEN AGAINST INSURANCE MONEYS UNDER SECTION 22, DOMESTIC RELATIONS LAW — CODE CIV. PRO. §§ 2472, 2481, 2596, 2712, 2731. A surrogate has only such jurisdiction as is expressly or by necessary implication conferred by statute. While the tendency of recent legislation has been to enlarge his powers, he has not yet been given the broad powers of a court of equity which are necessary to enforce a creditor's lien upon the proceeds of a policy of insurance issued on the life of a husband in which the wife was named as the beneficiary and the annual premium on which was in excess of $500, and to determine, in a proceeding by a creditor of the estate to compel her as executrix to account, whether as between her individually and the creditors of her deceased husband any part of such proceeds is chargeable with a lien in favor of his creditors under the Domestic Relations Law (L. 1896, ch. 272, § 22). The Code of Civil Procedure (§§ 2472, 2481, 2596, 2712, 2731) confers no such jurisdiction either expressly or impliedly; the amount of insurance purchased by the excess

of premiums does not belong to the husband in his lifetime and forms no part of his estate after his death even as to creditors; the premiums paid do not constitute a debt against his wife in favor of himself or his estate; the proceeds are not assets and cannot be included in the inventory; they are liable "primarily" for his debts solely by force of the statute; they constitute a separate fund, devoted exclusively to the payment of the deficiency arising after all the assets of the estate have been applied upon the debts, while the surplus, if any, is to be returned to the widow. The phrase "property alleged to belong to the estate," as used in section 2731 of the Code, means property which is "deemed assets" as defined in section 2712, and which may be inventoried under section 2714. An allegation in the petition, therefore, that the insurance moneys were property of the estate, gives the surrogate no jurisdiction to try the question of title or enforce the lien any more than if a similar allegation had been made with reference to the title to real estate or other matters over which the surrogate has no jurisdiction.

2. PROCEDURE TO ENFORCE LIEN. The orderly course of procedure in such a case is by a representative action to establish and enforce the lien after the assets of the estate have been exhausted and the amount required to pay the remainder of the husband's debts has been established by a surrogate's decree, and in such an action distribution may be made and circuity thus avoided.

Matter of Thompson, 102 App. Div. 617, reversed.

(Argued January 10, 1906; decided February 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered February 15, 1905, which affirmed a decree of the Kings County Surrogate's Court surcharging the accounts of the executrix herein in a proceeding for an involuntary accounting.

The facts, so far as material, are stated in the opinion.

Henry Hill Pierce for appellant. The surrogate had no jurisdiction to determine the question whether the proceeds of this policy were liable to the claims of the husband's creditors. (*Matter of Colton*, 159 N. Y. 129; *Kittel* v. *Domeyer*, 175 N. Y. 205; *Matter of Bunting*, 98 App. Div. 122; *Montgomery* v. *Boyd*, 78 App. Div. 64; *Matter of Kellogg*, 39 Hun, 275; *Matter of Randall*, 152 N. Y. 508.)

Edward W. S. Johnston for respondent. The court below had power to pass upon the question whether the account of

the appellant should be surcharged with the proportion of the insurance money purchased by the appellant's testator by premium in excess of $500, and the surrogate was not called upon to determine any disputed question of title. (Code Civ. Pro. § 2472; *Matter of Lamb*, 22 N. Y. S. R. 350; *Matter of Mull*, 16 N. Y. S. R. 982; *Matter of Ammarell*, 38 Misc. Rep. 400; *Matter of Dummett*, 38 Misc. Rep. 478; *Matter of U. S. Trust Co.*, 175 N. Y. 304.)

VANN, J. This proceeding was commenced before the surrogate of Kings county by Charles A. Bryan, a creditor of Francis A. Thompson, deceased, to compel Ella S. Thompson, his executrix, to make and file an account of her proceedings. An order was made accordingly and thereupon she filed an account in which she stated that all the property received by her as executrix was worth but ten dollars, and that she had paid out for funeral expenses the sum of $188, thus leaving a deficit. The creditor filed objections to the account and alleged that the executrix had omitted to state the collection by her of about $13,000, "said sum being the proportionate amount of a certain policy of life insurance, issued on the life of the above named decedent by the Equitable Life Assurance Society of the United States on or about the 27th of February, 1895, for the sum of $34,000, upon which the annual premium paid by the decedent in his lifetime was $806.14, and three-eighths of said sum of $34,000 formed a part of the estate of said decedent." The issue was tried before the surrogate against the objection of the executrix promptly made at the beginning of the trial and many times renewed during its progress, that he had no jurisdiction to try the question whether said sum of $13,000 belonged to the wife, the beneficiary named in the policy, or to the estate of the decedent, or to his creditors. The objections were overruled and the executrix excepted.

Upon the trial it appeared that one John Mortimer died on the 28th of September, 1875, leaving a daughter, Ann E. Thompson, who died in January, 1901, leaving a son, the

decedent Francis A. Thompson, who died in March, 1901, leaving Ella S. Thompson his widow and executrix. By the will of John Mortimer a trust fund amounting to $68,850 was created and the trustees were directed to pay the income therefrom to said Ann E. Thompson during her life and after her death to divide the corpus among her lawful issue. The decedent, as one of her two children, thus became entitled in remainder to one-half of the fund in case he survived his mother. In March, 1895, he transferred his interest in the fund to one Cohen in consideration of $17,000, of which $5,000 was to be retained by Cohen and applied by him in payment of the annual premiums upon a policy of insurance issued at about the same time by the Equitable Life Assurance Society upon the life of the decedent for the sum of $34,000 in favor of his wife. By a tripartite agreement entered into between the decedent, his wife and said Cohen, it was provided that if the entire amount of the sum thus appropriated to pay the premiums was not required, the remainder was to be paid by Cohen to the decedent, his wife or the survivor. As a part of the arrangement Mrs. Thompson assigned the policy to Cohen to protect him against the contingency of the death of the decedent before his mother, but in case he survived his mother it was agreed that the policy together with all rights and interests accruing thereunder should be reassigned to Mrs. Thompson. Cohen also agreed to pay the premiums on the policy until said sum of $5,000 devoted to that purpose should be exhausted, while the decedent and his wife agreed that they would then deposit annually with Cohen an amount sufficient to pay the current premium. Seven annual premiums of $806.14 each were paid on said policy, of which five were paid by Cohen out of the fund of $5,000, while the other two were not paid by the decedent or out of his property. The decedent survived his mother for a few months and died in March, 1901. In the month of April following the insurance company paid $34,000, the amount called for by the policy, to Cohen, and in January, 1902, Cohen paid the same to Mrs. Thompson after deducting the sum of $1,250, allowed

for the expenses of certain litigation that had sprung up, and took a release from her individually and as executrix.

The surrogate found these facts among others and adjudged that the account of the executrix should be surcharged with the sum of $12,911.88 for the benefit of the creditors of the decedent. The Appellate Division affirmed, and Mrs. Thompson, both individually and as executrix, appealed to this court.

Section 22 of the Domestic Relations Law, so far as now material, is as follows: "A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts. * * * A policy of insurance on the life of any person for the benefit of a married woman, is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured."

Construing this statute, we have held that the wife's right to the insurance fund created by the husband's annual appropriation or investment of his moneys in premiums for insurance upon his life for the benefit of his wife, does not rest upon contract, but upon legislative grant, exempting the fund from the claims of creditors; that the statute is an enabling act and relates to the remedy; that the state has the right to change the exemption before the fund reaches the wife, and, therefore, the proceeds of policies issued before the enactment of the statute are subject to its provisions. (*Kittel* v. *Domeyer*, 175 N. Y. 205.) We further held in that case

that the statute does not authorize an immediate proceeding by a creditor of the husband against the insurance fund without regard to the condition of the estate generally, and that the wife should not be deprived of any portion of the insurance moneys until it is ascertained by administration upon the estate that the other assets will not suffice to satisfy the claims of creditors. We also declared that until such claims are discharged they are a lien upon so much of the insurance money as was purchased by the excess of the annual premium above $500; that the amount thus purchased is, as to the wife, a fund for all the creditors of the deceased and liable primarily for the payment of the husband's debts in preference to the rights of the wife, which are thus postponed as to that part of the insurance to the rights of creditors.

Although the burden was upon the creditors of showing what proportion of the insurance moneys received by Mrs. Thompson was purchased by the excess of the annual premium above $500, "actually paid annually out of" her "husband's property," they failed to show this as to two out of the seven premiums. Still the surrogate, for some reason that we cannot discover, held that the portion of such moneys purchased by the excess of each of the two premiums not paid by the husband or out of his property was liable for his debts the same as the portion of the excess actually paid for out of his property.

As the jurisdiction of the surrogate to try the issue is challenged, that question should be first determined. A surrogate, meaning literally a substitute, or one who acts for another, from the earliest times has been an officer of limited jurisdiction. Originally in England he was the bishop's chancellor, and presided for him in the diocesan court. In colonial times he was the delegate or substitute of the governor, and acting for him admitted wills to probate. Shortly after the Revolution statutes were passed which cautiously extended his powers by bringing other subjects within his jurisdiction. (2 Laws of New York [Jones & Varick's edition],

71; 1 Greenleaf's Laws, 238; 3 ib. 391; L. 1799, p. 724; 1 Webster's Laws, pp. 317, 325; 3 ib. 158, 316; 5 ib. 138; L. 1813, p. 139; L. 1819, p. 215; L. 1823, p. 62.) The Revised Statutes defined and to some extent enlarged his powers, but care was taken to prevent him, "under pretense of incidental powers or constructive authority," from exercising "any jurisdiction whatever not expressly given by some statute of the State." (2 R. S. 220, § 1; *Matter of Brick's Estate*, 15 Abb. Pr. 12, 15.) In 1837 this severe restriction was repealed, and it was held that the effect was to restore the incidental powers possessed by Surrogates' Courts previous to the Revised Statutes. (*Sipperly* v. *Baucus*, 24 N. Y. 46.) By the Judiciary Act of 1847 and by various other statutes, changes were made and defects corrected, but still the jurisdiction of the surrogate was not advanced to any remarkable degree, although his court was finally made a court of record. New subjects were added to his jurisdiction but general powers were carefully withheld from him. Even the codification which went into effect on the first of September, 1880, left the powers of Surrogates' Courts substantially where it found them. (Redfield on Surrogates [6th ed.], introduction, page 20; McClellan's Surrogates' Courts [3d ed.], p. 8.) The codification, as amended from time to time, still governs the subject and is that part of the Code of Civil Procedure known as chapter 15, embracing sections 2472 to 2860, inclusive. The general jurisdiction of the surrogate and his court appears in section 2472 by which, among other things, he is authorized to direct and control the conduct and settle the accounts of executors; to enforce the distribution of the estates of decedents and the payment or delivery by executors of money or other property in their possession belonging to the estate and to administer justice in all matters relating to the affairs of decedents according to the provisions of the statutes relating thereto.

By section 2481 certain incidental powers relating to procedure are conferred upon the surrogate. With respect to any matter not expressly provided for in that section he is

authorized thereby to proceed in all matters subject to the cognizance of his court, according to the course and practice of a court having by the common law jurisdiction of such matters except as otherwise prescribed by statute, and to exercise such incidental powers as are necessary to carry into effect powers expressly conferred.

By section 2596, which relates to the liability of sureties for moneys received by a person to whom letters have been issued, it is provided that such person is liable for money or personal property of the estate which was in his hands or under his control when his letters were issued in whatever capacity it was received by him or came under his control.

Section 2731, the remaining section relied upon to sustain the jurisdiction of the surrogate, provides that where a contest arises between the accounting parties and any of the other parties respecting property alleged to belong to the estate, but to which the accounting party lays claim, either individually or as the representative of the estate, or respecting a debt alleged to be due by the accounting party to the decedent, "the contest must, except where the claim is made in a representative capacity, in which case it may, be tried and determined in the same manner as any other issue arising in the surrogate's court."

The amount of insurance purchased by the excess of premiums paid out of the husband's property did not belong to him in his lifetime and formed no part of his estate after his death. The premiums paid by him did not constitute a debt against his wife in favor of himself or his estate. The proceeds of the policy were not assets and could not be included in the inventory. (Code Civ. Pro. § 2712.) He never owned any part of the policy which belonged wholly to his wife, but owing to the statute the portion purchased by the excess of premiums was liable for his debts. The statute does not make it a part of his estate nor provide that it shall be his property, even as to creditors, but directs that the fund itself shall be "primarily," that is, first in order of payment, liable for his debts. The liability is owing wholly to the com-

mand of the legislature. Like the exemption in favor of the wife it rests entirely "upon legislative grant." (*Kittel* v. *Domeyer*, *supra.*) The husband had no legal or equitable interest in the policy, but, as he died insolvent, the statute imposed a lien upon the proceeds thereof for the benefit of his creditors. If his wife had died before the policy was paid, the proceeds would have gone to her personal representatives, not to his, although the excess would still be subject to the claims of his creditors. The fund was liable for his debts without proof of fraud and independent of motive, simply because the statute said so. The liability does not rest on the common law, but, as was said with reference to the individual liability of stockholders of a state bank for its debts as provided by the Banking Law, "is purely statutory." (*Hirshfeld* v. *Fitzgerald*, 157 N. Y. 166, 185.)

While the tendency of recent legislation has been in the direction of enlarging the powers of the surrogate, he has not yet been given the broad powers of a court of equity which were necessary to enforce the liability in question. (*Matter of Randall*, 152 N. Y. 508; *Matter of Walker*, 136 N. Y. 20; *Sanders* v. *Soutter*, 126 N. Y. 193; *Matter of Wagner*, 119 N. Y. 28; *Bevan* v. *Cooper*, 72 N. Y. 317; *Stilwell* v. *Carpenter*, 59 N. Y. 414; *S. C.*, 62 N. Y. 639; *Matter of Bunting*, 98 App. Div. 122; *Matter of Schaefer*, 65 App. Div. 378; 171 N. Y. 686; *Matter of Kellogg*, 39 Hun, 275; 104 N. Y. 648.) We have repeatedly held that the surrogate has no jurisdiction except such as is expressly or by necessary implication conferred by statute. (*Riggs* v. *Cragg*, 89 N. Y. 479; *Matter of Bolton*, 159 N. Y. 134.)

The expression "property alleged to belong to the estate," as used in section 2731, means property which is "deemed assets," as defined in section 2712, and which may be inventoried under section 2714. The allegation that the insurance moneys were property of the estate did not give the surrogate jurisdiction to try the question of title or to enforce the lien any more than if a similar allegation had been made with reference to real estate, or to personal property fraudu-

lently transferred, or to the income from a trust fund in excess of the amount necessary to support the beneficiary and the like. Such questions are still withheld from the Surrogate's Court and when the legislature intends to extend its jurisdiction to those subjects it is safe to assume that it will do so in express terms and not leave it to be inferred from vague and indefinite expressions.

The issue tried by the surrogate was whether, as between Ella A. Thompson, individually, and the creditors of her husband, any part of the proceeds of the policy was charged with a statutory lien in favor of his creditors. The issue did not arise between the executrix and the creditors. The fund was in the hands of Mrs. Thompson as an individual only and a decree of a court of equity was necessary before it could be taken out of her hands by the creditors. The fact that she was executrix did not change the issue, although that accident is the only foundation for the claim that the surrogate had jurisdiction. The insurance moneys were not general assets of the estate. No part could be disposed of under the Statute of Distributions or used for the expenses of administration. They constituted a special fund created by statute for a special purpose and could be applied on the claims of creditors only after a decree of a court of equity.

The orderly course of procedure, as adopted in *Hirshfeld* v. *Fitzgerald* (*supra*), is by a representative action to establish and enforce the lien, after the assets of the estate have been exhausted and the amount required to pay the remainder of the husband's debts has been established by a decree of the surrogate. Distribution may doubtless be made in the action brought for that purpose and circuity thus avoided. No part of the fund is applicable to the purposes of general administration, as it is liable for debts only, and is held as a separate fund, devoted exclusively to the payment of the deficiency arising after all the assets of the estate have been applied upon the debts, while the surplus, if any, is to be returned to the widow. (*Kittel* v. *Domeyer*, *supra*.)

We think that the order of the Appellate Division and the

decree of the surrogate should be reversed, with costs to the appellant in this court and in the Appellate Division, and that the proceeding should be remitted to the surrogate for the purpose of establishing the exact amount of the deficit so that the creditors can take such further action as they may be advised.

CULLEN, Ch. J., O'BRIEN, HAIGHT, WERNER and HISCOCK, JJ., concur; WILLARD BARTLETT, J., not sitting.

Ordered accordingly.

THOMAS O'CONNOR, Respondent, *v.* VIRGINIA PASSENGER AND POWER COMPANY et al., Appellants.

1. DEMURRER — DEFECT IN PARTIES DEFENDANT. Where the complaint in an action asks relief against several persons not made parties, and whose presence is not necessary to a complete determination of the controversy, the prayer for relief may be deemed surplusage, and a failure to join them as defendants is not a ground for demurrer.

2. STOCKHOLDER'S ACTION — ALLEGATIONS NECESSARY. Where an action is brought by a stockholder against the corporation and three other defendants to have certain certificates of shares of stock of the corporation and certain of its mortgage bonds adjudged void, or, in lieu thereof, that the three last-named defendants pay to the corporation the value of such stock and bonds, the claim of the plaintiff is derivative and he is obliged to allege, *first*, a good cause of action in favor of the company of which he is a stockholder, and, *second*, facts which authorize his intervention and the institution of his suit in behalf of the corporation.

3. DEMURRER UPON GROUND OF IMPROPER JOINDER OF CAUSES OF ACTION. Where such complaint states two grievances, one of which constitutes a good cause of action in favor of the corporation of which he is a stockholder, and the other does not, and, so far as appears on the face of the complaint, the two grievances were independent transactions having no connection with each other, and there is no allegation that they were committed in pursuance of any common design or agreement, such grievances constitute separate causes of action within the meaning of the Code of Civil Procedure (§ 484) and the rules of pleading, and a demurrer to the complaint upon the ground that several causes of action are improperly united is well taken and should be sustained; nor are the defendants concluded from demurring thereto by a decision of the Special Term denying a motion made by them for an order requiring the plaintiff to separately state and number his two causes of action, upon the ground that there was but one cause of action.

4. STOCKHOLDER'S DEMAND THAT CORPORATION BRING ACTION. Where such complaint states a good cause of action in favor of the corporation against the other defendants, but does not allege that a demand was made upon the corporation to bring and prosecute the action and that such demand was refused, it fails to state a cause of action in plaintiff's favor unless it contains allegations sufficient to relieve him from making such application; and where an examination of the complaint fails to disclose any adequate excuse for plaintiff's failure to apply to the corporation, a demurrer thereto upon the ground that it does not state facts sufficient to constitute a cause of action in favor of plaintiff will be sustained.

O'Connor v. *Virginia Passenger & Power Co.*, 107 App. Div. 630, reversed.

(Argued January 10, 1906; decided February 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 21, 1905, which affirmed an interlocutory judgment of Special Term overruling demurrers to the complaint.

The following questions were certified:

First. Is there defect of parties defendant, as alleged in the defendants' demurrers?

Second. Have causes of action been improperly united, as alleged in defendants' demurrers?

Third. Does the complaint state facts sufficient to constitute a cause of action?

The nature of the action and the facts so far as material are stated in the opiniou.

Lewis E. Carr, *George W. Wickersham*, *Henry W. Anderson* and *Charles A. Gardiner* for appellants. The right of the plaintiff to sue was not original, but derivative, and depended on the right of the Virginia Company to sue for the same cause. His complaint does not contain the essential elements of such a cause of action. (*Flynn* v. *B. C. R. R. Co.*, 158 N. Y. 493; *Greaves* v. *Gouge*, 69 N. Y. 154; *Kavanaugh* v. *C. T. Co.*, 181 N. Y. 121.) The complaint does not state facts sufficient to make out a cause of action in favor of the Virginia Company. (*Christensen* v. *Eno*, 106 N. Y.

97; *Hallett* v. *M. M. Co.*, 35 Misc. Rep. 659; *Thompson* v. *Knight*, 74 App. Div. 316; *M. R. R. Co.* v. *Nichols*, 98 Ala. 92; *Drake* v. *N. Y. S. W. Co.*, 26 App. Div. 499.) If a cause of action in favor of the Virginia Company can be spelled out of the allegations of the complaint, the plaintiff's case still fails because his complaint does not state such facts as authorize him to sue on behalf of that company. (*Sage* v. *Culver*, 147 N. Y. 241; *Greaves* v. *Gouge*, 69 N. Y. 154; *Brinckerhoff Case*, 88 N. Y. 52; *Hanna* v. *Lyon*, 179 N. Y. 107.) There is a defect of parties defendant in the omission of the directors of the Virginia Company as parties to the action. (*O'Brien Case*, 143 N. Y. 377; Code Civ. Pro. § 452.) The complaint is demurrable because different causes of action are improperly sought to be united therein. (*Groh* v. *Flammer*, 100 App. Div. 305.)

John L. Hill for respondent. The rule applicable in a certain class of cases, that the right of a stockholder to compel restoration to a corporation of its property, fraudulent or otherwise wrongfully obtained, is conditioned upon the making of a prior demand that the corporation itself shall sue, is not applicable to this case. (Thomp. on Corp. § 4507; *Sage* v. *Culver*, 147 N. Y. 246; *Brinckerhoff* v. *Bostwick*, 88 N. Y. 52; *Hawes* v. *Oakland*, 104 U. S. 450; *Botts* v. *Turnpike Co.*, 88 Ky. 54; *Heath* v. *E. R. Co.*, 8 Blatchf. 347; *Dodge* v. *Woolsey*, 18 How. [U. S.] 331; 2 Pom. Eq. Juris. §§ 1093, 1095; *Mount* v. *R. T. Co.*, 93 Va. 427; *Rothwell* v. *Robinson*, 39 Minn. 1; *Nathan* v. *Tompkins*, 82 Ala. 437; *Farwell* v. *G. W. T. Co.*, 161 Ill. 522.) The plaintiff had the right to allege his facts either according to their legal effect, or circumstantially or partly in one way and partly in the other. (*Banks* v. *Sherman*, 38 N. Y. 69; *Publishing Co.* v. *Steamship Co.*, 148 N. Y. 41; *R. R. Co.* v. *Robinson*, 133 N. Y. 246; *Marie* v. *Garrison*, 83 N. Y. 23; *Sanders* v. *Soutter*, 126 N. Y. 196; *Zabriskie* v. *Smith*, 13 N. Y. 330; *Sage* v. *Culver*, 147 N. Y. 245; *Gray* v. *Fuller*, 17 App. Div. 35; *Lorillard* v. *Clyde*, 86 N. Y. 384.) There has been

no misjoinder of causes of action. (*O'Brien* v. *Fitzgerald*, 143 N. Y. 382; *Sayles* v. *White*, 18 App. Div. 590; *Scharf* v. *W. S. P. Co.*, 5 App. Div. 139; *Greeves* v. *Davies*, 100 App. Div. 359; *Gray* v. *Fuller*, 17 App. Div. 35; *Gray* v. *Belding*, 17 App. Div. 617.) The complaint discloses no defect of parties defendant. (15 Ency. Pl. & Pr. 658; *Heath* v. *E. R. Co.*, 8 Blatchf. 347; *Parsons* v. *Howard*, 2 Woods, 1; *Wall* v. *Thomas*, 41 Fed. Rep. 621; *Hazard* v. *Durant*, 19 Fed. Rep. 471; *Boyd* v. *Gill*, 19 Fed. Rep. 146; *Erwin* v. *O. R. Co.*, 27 Fed. Rep. 582; *H. B. S. Bank* v. *Boisseiux*, 3 Fed. Rep. 846; *Stockton* v. *Anderson*, 40 N. J. Eq. 486; *Dodd* v. *Wilkinson*, 41 N. J. Eq. 566; *Bailey* v. *Inglee*, 2 Paige, 279; *Cunningham* v. *Pell*, 5 Paige, 611; *Gilchrist* v. *Stevenson*, 9 Barb. 16; *Bartlett* v. *Hatch*, 17 Abb. Pr. 461.) The complaint alleges facts sufficient to constitute a cause of action in equity. (*Burrall* v. *B. R. R. Co.* 75 N. Y. 216; *Jermain* v. *L. S. & M. S. R. R. Co.*, 91 N. Y. 492; *Flynn* v. *B. C. R. Co.*, 158 N. Y. 504; *F. L. & T. Co.* v. *N. Y. & N. R. Co.*, 150 N. Y. 426; *Gamble* v. *Q. C. W. Co.*, 123 N. Y. 91; *Erwin* v. *O. R. & N. Co.*, 27 Fed. Rep. 630.)

CULLEN, Ch. J. This action is brought by a stockholder of the Virginia Passenger and Power Company to redress certain wrongs alleged to have been inflicted on that company by the defendants Frank and Helen Gould, and to have certain certificates of shares of the capital stock of said company and certain of its mortgage bonds held by said defendants adjudged void, or in lieu thereof that the said defendants pay the company their value. The complaint is inartificially drawn and is so voluminous, and most of the questions presented on this appeal are of so little general interest or application, as not to warrant us in incumbering the reports with the details of the charges. It is sufficient that we state our conclusions on the points raised by the demurrers and give briefly our reasons therefor.

The several grounds of the demurrers are: *First*, that there

is a defect of parties defendant; *second*, that separate causes of action are improperly joined, and, *third*, that the complaint does not state facts sufficient to constitute a cause of action. The first ground of demurrer is based on the demand found, in the prayer for relief that the directors of the power company, who committed the unlawful acts alleged, be held responsible for any loss or deficiency occasioned by their conduct. As it is not even stated in the complaint who these directors were, nor are they made parties to the action, it seems rather difficult to imagine on what theory such relief was asked. Nevertheless, as their presence is in no way necessary to a complete determination of the controversy between the plaintiff and the defendants Gould, the prayer for relief referred to may be deemed mere surplusage and the failure to join them as defendants in no way can prejudice these defendants. This ground of demurrer is bad.

The other grounds of demurrer can be most readily considered together. The claim of the plaintiff being derivative he was required to allege in his complaint, *first*, a good cause of action in favor of the Virginia Power Company; *second*, facts which authorized his intervention and the institution of his suit in behalf of his corporation. (*Kavanaugh* v. *Commonwealth Trust Co.*, 181 N. Y. 121.) The grievances of which the complaint complains are two: First, a transaction by which a large part of the capital stock of the power company was acquired by the defendant the Atlantic Development Company, under a contract by which the latter company was to market the mortgage bonds of the power company at a specified rate, which stock, on the abrogation of the contract, was assigned to the defendants Gould instead of being restored to the corporation. As to this we think the complaint does state a good cause of action in favor of the defendant power company. The second transaction is one by which the defendant Frank Gould acquired certain bonds of the power company, pledged as collateral to secure the payment of the two notes of that company. We are inclined to the view that the complaint does not state a good cause of

action in regard to this matter. It is alleged that Frank Gould acquired the notes and collateral by assignment from the payee or holder thereof. We cannot see what there was illegal in this. It is alleged that the corporation was able to pay and discharge the notes, but it is not alleged that it did so or even tendered payment. Part of the relief asked is that Frank Gould pay the difference between the market value of the bonds and the sum he paid for them. The corporation, however, can be entitled to no such relief. Gould stands in the same position as his assignor, the original pledgee of the bonds, and he is entitled to hold them until the debt to him is satisfied. But though the allegations of the complaint do not state a good cause of action as to this transaction, still we think it is a separate cause of action within the Code and rules of pleading. If in an indictment two offenses are intended to be set out in a single count, the indictment is bad for duplicity, even though one of the offenses is set out defectively. (*Dawson* v. *People*, 25 N. Y. 399.) Under section 484 of the Code of Civil Procedure separate causes of action can be united only when they affect all the defendants. As far as appears on the face of the complaint the two matters of which the plaintiff complains were independent transactions having no connection the one with the other. It is not alleged that they were committed in pursuance of any common design or agreement to defraud or injure the corporation. The second cause of action relates solely to Frank Gould. Helen Gould is not charged to have in any way participated therein. The respondent contends that the appellants are concluded by an adverse decision of a motion made by them to compel him to separately state and number his two causes of action. The motion was denied by the Special Term on the ground that there was but one cause of action. The appellants, however, are not concluded by a decision on the question of practice, for "if the complaint contains several causes of action improperly united contrary to the Code as is claimed, the vice may be reached by a demurrer, and the failure of the plaintiff to state them separately and number

them would not be an answer to it, nor would a failure to move to correct the complaint in this respect defeat the effect of a demurrer." (*Goldberg* v. *Utley*, 60 N. Y. 427.) Therefore, the objection that several causes of action are improperly united is well taken.

But though, as we have held, the complaint does state a good cause of action in favor of the power company against both Frank and Helen Gould, we think it fails to state facts sufficient to constitute a cause of action in the plaintiff's favor. In a derivative action of the character of the present one "the complaint should allege that the corporation, on being applied to, refused to prosecute, and that this averment constitutes an essential element of the cause of action." (*Flynn* v. *Brooklyn City R. R. Co.*, 158 N. Y. 493; *Greaves* v. *Gouge*, 69 N. Y. 154.) The complaint alleges no such demand or refusal. The general rule is subject to this exception, that where facts are alleged showing that the demand would be unavailing, a demand is unnecessary. (Morawetz on Corporations, § 242; *Brinckerhoff* v. *Bostwick*, 88 N. Y. 56; *Barr* v. *N. Y., Lake Erie & W. R. R. Co.*, 96 N. Y. 444.) We are thus brought to the most serious question in the case, whether the allegations of the complaint are sufficient to relieve the plaintiff from first applying to the corporation for redress of his wrongs. In this long complaint there are but three allegations relied on for that purpose. It is alleged that after the abrogation of the contracts between the Virginia Company and the Atlantic Development Company, and the acquisition by the Goulds of the stock issued to the development company, the Goulds, in February, 1904, caused the election of the board of directors "subservient to the domination and dictation of said defendants." It is also alleged that the "company by its board of directors, acting fraudulently and collusively and under the domination of Frank Gould" issued various amounts of mortgage bonds to the Goulds at an inadequate price. If the complaint alleged that the directors of the corporation at the time of the commencement of the suit were the same as those who had committed

the wrongs for which the suit is brought, it would relieve the plaintiff from making any demand on the corporation, for it may be assumed that such directors would not prosecute or, at least, not prosecute in good faith an action based on their own misconduct. But the complaint makes no such allegation, and, at least by inference, charges the reverse. It is alleged that the Goulds, in February, 1904, by virtue of the acquisition of the stock elected the board of directors. But the wrongful acts complained of were committed not by that board but by its predecessor, and there is nothing to show that the two boards were composed of the same individuals. Nor is the allegation that the new directors were "subservient to the domination and dictation of said Frank Jay Gould and Helen Miller Gould" sufficient to prove that they would not prosecute against the Goulds a well-founded cause of action. It is not necessarily through dishonest or improper motives that persons may be subject to the domination and dictation of others. If the directors were the same as those who committed the wrongs, or if they were acting fraudulently, dishonestly or collusively with the Goulds for the purpose of defrauding the corporation in the latter's interest, it was very easy to say so and there is no reason why the charge should not be explicitly and unequivocally made. In *Brewer* v. *Boston Theatre* (104 Mass. 378) the allegation was "that the present board of directors of said defendant corporation are united in the interest of and under the control of said Tompkins and Thayer." This was held insufficient, the Supreme Court saying: "It does not show that such an application upon a suitable representation of facts, would prove unavailing." It is true that under the rules for the construction of pleadings prevailing in this state great latitude is permitted and inferences generously indulged in to support a pleading. It may well be doubted whether we have not carried this liberality too far and set a positive premium on bad pleading, oftentimes with the result that the worst pleading is the most difficult to meet or answer.

The orders of the Appellate Division and of the Special

Term should be reversed and judgment rendered for the defendants on demurrer, with costs in all the courts, with leave to the plaintiff to serve an amended complaint within twenty days on the payment of such costs. The first and third questions certified should be answered in the negative and the second question answered in the affirmative.

O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Ordered accordingly.

In the Matter of the Revocation of the Probate of the Will of MARY A. MYER, Deceased.

CARRIE L. MYER, Individually and as Administratrix with the Will Annexed, et al., Appellants; JOHN V. MYER et al., Respondents.

1. WILL — MENTAL INCAPACITY OF TESTATRIX — ERRONEOUS ADMISSION OF EVIDENCE RELATING TO MENTAL DISEASE OF RELATIVES — CODE CIV. PRO. §§ 834, 836. In a proceeding for the revocation of the probate of a will upon the ground that testatrix, at the time of the execution thereof, was not mentally capable of making a will, it is erroneous to permit the petitioner, in order to supplement and support evidence that the testatrix was afflicted with paresis, and against the objection that such testimony was incompetent and privileged, under section 834 of the Code of Civil Procedure, to prove by two physicians who had attended the mother and brother of testatrix in a professional capacity, and whose knowledge was obtained while attending such persons, and was necessary in order to treat them, that both the mother and brother of testatrix had been afflicted with "general paresis;" since, by the express terms of section 836, the provisions of section 834 are made to apply to "any examination of a person as a witness," and the fact that the testimony of the physicians related to patients who were not parties to the proceeding or interested therein, and who were dead at that time, does not take it out of the prohibition of the statute.

2. SAME. Such evidence is also incompetent where there are no facts which tend to show that the paresis with which the mother and brother of testatrix are said to have been afflicted was acquired by them under circumstances which would render it transmissible so as to taint the family blood. While it is the rule in cases where the mental soundness of an individual is in question, that the insanity of blood relations in the

ancestral line may be shown as tending to establish the fact in issue, indiscriminate and unexplained evidence of diseases afflicting such relations and affecting their mental faculties is incompetent.

3. EVIDENCE — ERRONEOUS REFUSAL TO STRIKE OUT ANSWER OF LAY WITNESS AS AN OPINION. Where a lay witness who had testified in detail as to acts and conversations of the testatrix was asked, "What was the impression they (the acts and conversations) made on you as to whether they were rational or irrational?" to which the witness answered, "She was irrational, I thought," the denial of a motion to strike out the answer is erroneous; while the question was proper in form the answer was in violation of the rule that lay witnesses are not permitted to give an opinion upon the question of mental capacity.

4. SAME — ADMISSIONS OF EXECUTOR AND LEGATEE — INCOMPETENT AS EVIDENCE AGAINST OTHER LEGATEES. Evidence of admissions and declarations made by the executor and legatee of a disputed will, prior to the execution thereof and to the effect that the mind and memory of testatrix were poor and that she was not capable of doing business, is incompetent as against other legatees, parties to the proceeding and interested in the result, who are not jointly interested with such executor, but on the contrary have different and separate interests.

Matter of Myer, 100 App. Div. 512, reversed.

(Argued January 18, 1906; decided February 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 11, 1905, which affirmed a decree of the Seneca County Surrogate's Court revoking probate of the will of Mary A. Myer, deceased.

This proceeding was instituted in the Surrogate's Court of Seneca county to procure the revocation of the probate of the will of Mary A. Myer, deceased, upon allegations that at the time of the execution thereof she was not mentally capable of making a will and that its execution was procured by the undue influence of her son, William H. Myer. The petitioners are Mary L. C. King, the only daughter of testatrix, and John V. Myer, her youngest son.

The testatrix died in the village of Lodi, Seneca county, November 11th, 1899. She left a will dated July 11th, 1899, which was admitted to probate April 17th, 1901. She was survived by three children, William H. Myer, Margaret L.

C. King and John V. Myer. She gave the major portion of her estate, consisting of both real and personal property valued at about eight or nine thousand dollars, to her son William H. Myer, and appointed him sole executor. To her daughter Margaret L. C. King she gave nothing, and to her son John V. Myer a life estate in $2,000. She had a number of grandchildren to each of whom she gave $100. The other provisions of the will are immaterial to the questions before us.

Upon the probate of the will in April, 1901, William H. Myer duly qualified as executor thereof. He died shortly thereafter, and on April 14, 1902, his widow, Carrie L. Myer, who was also a legatee, was appointed administratrix with the will annexed. On the same day this proceeding was commenced for the revocation of such probate under sections 2647–2653a of the Code of Civil Procedure. Upon conflicting evidence bearing upon the issues of mental capacity and undue influence, the surrogate rendered a decision wherein he found, "That said Mary A. Myer was an old woman and had for a long time suffered from shaking palsy, which had become chronic; and that at the time of the execution of the alleged will she was and for a long time had been a paretic; that at the time of the execution of the alleged will the testatrix was not of sound disposing mind, memory and understanding, and by reason of mental weakness was incompetent to make the same." There was no finding upon the issue as to undue influence, and a decree was entered revoking the probate of the will.

Exceptions to the decision were filed by Carrie L. Myer, individually and as administratrix, and by the special guardian of four infant grandchildren of testatrix who were also legatees, and from the decree thus entered they appealed to the Appellate Division. That court unanimously affirmed the decree, and the same parties have now appealed to this court.

J. N. Hammond, Francis C. Allen and *Benjamin Franklin* for appellants. The surrogate erred in the admission

and exclusion of evidence. (*Naul* v. *Naul*, 75 App. Div. 292.)

William S. MacDonald for respondents. Appellants' exceptions to admission of evidence were not well taken and present no prejudicial error. (Code Civ. Pro. § 834; *Matter of Murphy*, 85 Hun, 575; *Pringle* v. *Burroughs*, 70 App. Div. 12; *Holcomb* v. *Harris*, 166 N. Y. 257; *People* v. *Koerner*, 154 N. Y. 355; *Matter of Lowenstein*, 2 Misc. Rep. 323; *Wyse* v. *Wyse*, 155 N. Y. 367; *Petrie* v. *Petrie*, 126 N. Y. 683.) There is no reversible error in the rulings of the surrogate. (Code Civ. Pro. § 2545; *Matter of Miner*, 146 N. Y. 121; *Loder* v. *Whelpley*, 111 N. Y. 239; *Hobart* v. *Hobart*, 62 N. Y. 80.)

WERNER, J. The unanimous affirmance by the court below precludes the examination in this court of any of the questions raised by the appellants, save those arising upon exceptions taken to the rulings of the surrogate upon the admission or rejection of evidence. Some of the exceptions thus taken present errors which require a reversal of the order appealed from, because it appears that the exceptants were clearly prejudiced by such rulings. (Code Civ. Pro. § 2545.)

The petitioners introduced testimony tending to show that, at the time of the execution of the will, the testatrix was afflicted with paresis, which it was claimed deprived her of testamentary capacity. In order to supplement and support this evidence, the petitioners called two physicians, Drs. Carlton and Townsend. The former had been the medical adviser of the testatrix's brother, and the latter of her mother. These witnesses testified that both the mother and brother of testatrix had been afflicted with what they termed "general paresis;" that their knowledge of this condition was obtained while attending such persons in their professional capacity, and that such knowledge was necessary in order to treat them. The testimony was objected to as incompetent and privileged under section 834 of the Code of Civil Procedure, and the

ruling admitting it was properly excepted to because it was inadmissible upon two grounds. 1. It is clearly within the provisions of section 834, which prohibits a physician from disclosing "any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." (*Renihan* v. *Dennin*, 103 N. Y. 573; *Feeney* v. *Long Island R. R. Co.*, 116 id. 375; *Fisher* v. *Fisher*, 129 id. 654; *Nelson* v. *Village of Oneida*, 156 id. 219; *Meyer* v. *Knights of Pythias*, 178 id. 63.)

By the express terms of section 836 the provisions of section 834 are made to apply to the "examination of *any* person as a witness." The fact that the testimony of these physicians related to patients who were not parties to the proceeding or interested therein, and who were in fact dead at that time, does not annul the prohibition of the statute. In *Davis* v. *Supreme Lodge* (165 N. Y. 159) the defense sought to prove the cause of death of two aunts of the deceased by the testimony of their attending physicians. The evidence was excluded, and this court upheld the ruling. Judge O'BRIEN, in writing for the court, said (p. 163): "This court has held that the statements of the attending physician, for the purpose of establishing the cause of death either of the insured himself or of his ancestors or their descendants, although not parties to nor beneficiaries under the contract, were not admissible. They are excluded not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist between the physician and patient, but on grounds of public policy as well. The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it." (*Grattan* v. *Met. Life Ins. Co.*, 80 N. Y. 281; *Westover* v. *Ætna Life Ins. Co*, 99 id. 56; *Nelson* v. *Village of Oneida*, 156 id. 219.) The general rule of exclusion provided for in section 834 is not obviated in this case by the

exceptions thereto contained in section 836, because the testimony objected to does not fall within either of these exceptions.

2. There is another equally potent reason why this evidence should not have been received. The case is barren of facts which tend to show that the paresis with which the mother and brother of testatrix are said to have been afflicted was acquired by them under circumstances that would render it transmissible so as to taint the family blood. It is doubtless the general and well-established rule that where the mental soundness of an individual is in question, the sanity of the blood relations in the ancestral line may be shown as tending to establish the fact in issue (*Walsh* v. *People*, 88 N. Y. 458), but that rule does not permit indiscriminate and unexplained evidence of diseases afflicting such relations and affecting their mental faculties. There must be evidence tending to show at least that such diseases are hereditary or transmissible. (*Reichenbach* v. *Ruddach*, 127 Pa. St. 564; *State* v. *Van Tassel*, 103 Iowa, 6.) In *Walsh* v. *People* (*supra*) one of the defenses interposed was, that the accused was afflicted with insanity superinduced by epilepsy. It was sought to be shown that a brother was suffering from the same malady. The ruling of the trial court excluding the evidence on the ground that it was not shown that epilepsy produces or tends to produce insanity, and that the disease is transmissible, was upheld. (Wharton & Stilles' Med. Juris. vol. 1 [5th ed.], § 330.) It is a scientific fact of common knowledge that the transmissibility of the malady known as "general paresis" depends to a great extent upon the conditions underlying the disease. The medical writers differ as to its cause or causes, but it seems to be conceded that the majority of cases result from syphilis, while in others it may be superinduced by various excesses or overexertions of the individuals afflicted. (Wharton & Stilles' Med. Juris. vol. 1 [5th ed.], §§ 883, 888.) Whether the particular form of the disease from which the testatrix and her family suffered was of such a transmissible character that she might be

said to have derived it from her ancestors cannot be determined from the evidence in the record, and it is, therefore, difficult to see how the testimony of the physicians was really pertinent to the issue whether the testatrix was possessed of testamentary capacity.

Another exception urged by counsel for appellants relates to the testimony of Abbie Letts, a witness called on behalf of the petitioners. She had testified in detail as to acts and conversations of the testatrix. She was then asked by counsel for petitioners whether such acts and conversations made any impression upon her as to their being rational or irrational. She answered: "I think they were irrational." This answer was stricken out on motion. Counsel for the petitioners then said: "I asked whether they made any impression on you," and she answered, "Yes, they did." The question was then asked: "What was the impression they made on you as to whether they were rational or irrational," to which she answered: "She was irrational, I thought." A motion to strike out this answer was promptly made, but denied under exception by counsel for the appellants. We think the motion should have been granted. While the question was proper in form, the answer was clearly in violation of the rule that lay witnesses are not permitted to give an opinion upon the question of mental capacity. They may only state their contemporary impressions as to the rationality or irrationality of the conversations or conduct testified to by them. (*Holcomb* v. *Holcomb*, 95 N. Y. 321; *Paine* v. *Aldrich*, 133 id. 547; *People* v. *Strait*, 148 id. 569; *People* v. *Youngs*, 151 id. 219; *People* v. *Koerner*, 154 id. 355.) It is obvious that the witness Letts intended to testify to nothing more than her impressions derived from the facts which she had stated, and it is quite probable that the learned surrogate so understood it. The exception is purely technical, and standing alone would not be sufficient to justify a reversal (*Wyse* v. *Wyse*, 155 N. Y. 367), but since there must be a new trial on other grounds, we call attention to the error so that it may not be repeated.

The only other exceptions which we deem it necessary to discuss arise upon the evidence introduced by the petitioners to prove certain admissions made by William H. Myer, the executor and principal legatee. One witness testified to a conversation had with him in 1895 or 1896, in which he said he thought the testatrix was failing very much; that she was weak and nervous, and that her mind and memory were poor. This evidence was objected to as incompetent, inadmissible, irrelevant and too remote. Another witness testified to a conversation had with him in the spring of 1899 in which he said that the testatrix was failing fast and that she was not capable of doing business any more. This was admitted under objection that it was inadmissible, irrelevant, incompetent, and that the statements of William A. Myer cannot bind the estate of Mary A. Myer.

The will was executed in July, 1899. These admissions were made prior to its execution, and if William H. Myer were the only legatee in interest, they would be competent and cogent evidence against him. But there were other legatees who were parties to this proceeding and interested in the result thereof. They were not jointly interested with William H. Myer, but on the contrary their interests were several. The question raised by these exceptions has been recently passed upon by this court in a case very similar to the one at bar, and there the ruling of the surrogate excluding evidence of the same character was sustained. (*Matter of Kennedy*, 167 N. Y. 163, 177.) In that case we said: "The general doctrine is doubtless correct that the admissions or declarations of a party to the record may be taken as against himself or another party having a joint interest with him, but this rule can have no application to a proceeding to prove a will where other parties are interested in the estate as tenants in common. In this case the admissions or declarations of the nephew could not bind the sister, and since upon proof of a will there can be but one decree, either of rejection or of probate, the declarations of one of the parties cannot, from the very nature of the case, be received as evidence without prej-

udice to the rights of the other. One tenant in common cannot admit away the rights of his co-tenant. Since the will could not have been admitted as to the sister and rejected as to the nephew, the admissions or declarations of the latter were not admissible. The respective interests of the next of kin were not joint, but each would hold his share in severalty. There was no privity between the parties such as would permit the admissions or declarations of one to be received as evidence against the other." (*Dan* v. *Brown*, 4 Cow. 483, 492; *Grant* v. *Grant*, 1 Sand. Ch. 235; *Brush* v. *Holland*, 3 Bradf. 240; *La Bau* v. *Vanderbilt*, 3 Redf. 384, 399; *Matter of Baird*, 47 Hun, 78; *Naul* v. *Naul*, 75 App. Div. 294; *Clark* v. *Morrison*, 25 Pa. St. 453; *Pier* v. *Duff*, 63 id. 59; *Shailer* v. *Bumstead*, 99 Mass. 127; Chase's Stephen's Digest of the Law of Evidence [2nd ed.], p. 69; Abb. Trial Evidence [2nd ed.], pp. 201, 202; 1 Greenl. Ev. § 176.)

Other exceptions have been brought to our attention, but we do not regard them of sufficient importance to justify discussion.

The decree of the surrogate and the order of the Appellate Division should be reversed and a new trial ordered before a jury in the Supreme Court, costs to abide the event.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN and WILLARD BARTLETT, JJ., concur; HISCOCK, J., not sitting.

Ordered accordingly.

JESSE M. ADAMS, as Administrator with the Will Annexed of the Estate of JOHN A. SHERMAN, Deceased, Appellant, *v.* GEORGE B. MASSEY, Respondent.

1. WILL — WHEN LIFE ESTATE WILL NOT BE CONVERTED INTO ABSOLUTE ESTATE IN FAVOR OF SAME PERSON BY CLAUSE OF DOUBTFUL MEANING. A life estate expressly created by a will cannot by a later clause be converted into an absolute estate in favor of the same person, on the theory that where two testamentary clauses are antagonistic the later must stand as the last expression of intention, unless the later clause is as clear as the first and cannot be reconciled therewith and the

real intent of the testator cannot be gathered from the general scope of the will or otherwise; where there is no doubt as to the meaning of the first clause, while there is doubt as to the meaning of the later clause, so that either of two constructions is possible, that construction will be adopted which will give effect to both; doubt as to the meaning of the last, instead of destroying the limitation in the first clause, confirms it.

2. SAME. A holographic will provided, "I give, devise and bequeath to my * * * wife" certain real estate and personal property, including shares of corporate stock, "To have and to hold during her natural life." By a subsequent clause the testator provided, "I further give and bequeath any other property not herein otherwise before disposed of that may be in my possession at the time of my decease to my wife * * * first to liquidate any indebtedness that may be against me; the balance, if any, to be at her sole disposal." At the date of his will he had no property not specifically mentioned therein, except some money in the bank, and at the date of his death his assets were about the same, except the cash in the bank was less, and he had acquired some additional corporate stock. In an action by his representative commenced after the death of the widow, to recover the shares of capital stock given to her for life and claimed to have been bequeathed to her absolutely by the later clause, upon the ground that they were unbequeathed assets belonging to his estate, *held*, upon an examination of the two clauses — the first explicitly creating a life estate, while the later, to say the least, was of doubtful meaning — also upon a consideration of the situation of the parties at the time of the execution of the will and at testator's death, and of his actual intent as disclosed by the language used therein — that the life estate of the widow as to the securities mentioned was not by the later clause converted into an absolute estate in her favor, and that the plaintiff was entitled to recover.

Adams v. *Massey*, 102 App. Div. 620, reversed.

(Argued January 15, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 13, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

John A. Sherman, formerly of the city of Watertown, died on the 25th of March, 1882, when he was about seventy-five years of age. He left a last will and testament, dated January 1st, 1877, executed on the 20th of April following and admitted to probate on the 10th of April, 1882. The plaintiff is his legal representative.

He left him surviving his widow, Julia Ann, who, after re-marrying, died on the 13th of October, 1901, in the ninety-fifth year of her age. The defendant is her legal representative.

Mr. Sherman also left a daughter, Caroline, who married one Daniel S. Marvin in 1863 and died in 1896 at the age of sixty-three, having never had any children. She was the only child of Mr. Sherman and his wife and at the date of the will, as well as at the date of his death, was a member of his family. For nearly twenty years prior to his death she was an invalid and during the last ten years of his life she did not leave his house, except occasionally for a drive, when she was assisted to and from the carriage and was accompanied by some one during the ride. Her husband lived with her as a member of Mr. Sherman's family, which consisted of the four persons named. Mr. Marvin was not engaged in any commercial business, but managed a small nursery of his own.

Mr. Sherman had had a large experience in business affairs and was director of a national bank, trustee of a savings bank and president of the Agricultural Insurance Company. His estate, worth nearly $100,000, consisted of the property specifically mentioned in his will, together with about $1,500 on deposit in various banks at the date of the will, and at the date of his death his assets were about the same, except that the money in bank had run down to about $700, while he had added to his holdings in stocks by the purchase of insurance and bank shares worth about $4,000. The amount of his debts at either date does not appear.

The will is wholly in the handwriting of Mr. Sherman, who was not a lawyer, and so far as appears was drawn by him without assistance or advice. The first clause disposes of nothing, but is confined to recitals and statements of no value in this controversy. The second clause is as follows:

"2nd. I give, devise and bequeath to my ever faithful and beloved wife, Julia Ann, my present residence situate on the corner of Stone and Massey street, in the City of Watertown, together with all the appurtenances thereunto belonging, consisting of household furniture, beds and bedding, all and

everything therein contained except the works of art executed by my daughter Caroline, all of which belong to her. Also horse and cow, carriages, sleighs and harness which may be in my possession at the time of my decease. Also my gold watch, also ($3,000) Three Thousand Dollars of the capital stock of the Agricultural Insurance Co., of Watertown, N. Y. Also ($1,500) one thousand five hundred dollars of the capital stock of the National Union Bank of Watertown. Also five shares of the American Express Co. of the City of N. Y. To have and to hold during her natural life."

By the third clause he gave his daughter Caroline "$2,000 of the capital stock of the Agricultural Insurance Company," and by the fourth and fifth $5,000 of the capital stock of the Watertown Fire Insurance Company to each of his sisters, Sylvia Orinda Lewis and Mary Jane Sherman.

By the sixth clause he gave to the Young Men's Christian Association of Watertown a valuable piece of real property, known as Washington Hall, in the city of Watertown, subject to an annual charge out of the rents and profits of $2,500 to be paid in quarterly installments to his wife during her life, and in case his daughter should outlive her mother, "then the sum of $2,000 annually shall be paid her or her legal representatives during her life in the same manner as above stated to her mother."

By the seventh clause he gave certain directions in relation to the management of the Washington Hall property and closed the same by an independent sentence in these words: "I further give and bequeath any other property not herein otherwise before disposed of that may be in my possession at the time of my decease to my wife Julia Ann, first to liquidate any indebtedness that may be against me; the balance, if any, to be at her sole disposal."

This sentence, in the handwriting of Mr. Sherman, was written on a separate piece of paper, which was pasted upon the margin of the page in the form of a rider, so that it loosely folded over but did not obscure the last part of the seventh clause, as originally written.

By the eighth clause he appointed his wife, "with the advice and council, D. S. Marvin, husband of my daughter Caroline," and his friend G. B. Massey, his "sole executor and administrator." There was no other clause which disposed of anything and all the gifts except the last were of specific property. Whenever he gave real estate or real and personal property he began the clause with the words, "I give, devise and bequeath," and whenever he gave personal property only he began the clause with the words, "I give and bequeath," which were also used to begin the last sentence above quoted.

This action was brought to recover thirty shares of the capital stock of the Agricultural Insurance Company, fifteen shares of the capital stock of the National Union Bank and five shares of the capital stock of the American Express Company, mentioned in the second clause, on the ground that they were unbequeathed assets belonging to the estate of John A. Sherman, deceased. The answer admitted the ownership of the shares in question by the testator at the date of his death and alleged that the same are now in the possession of the defendant claiming title thereto as the personal representative of Julia A. Sherman, deceased, but denied that the plaintiff had any interest therein. Judgment was demanded "for the possession of the stock above mentioned and that the defendant may be adjudged to deliver the same up to the plaintiff" with damages for detention and also damages to the amount of the value thereof in case delivery could not be made.

Upon the first trial the plaintiff had judgment, which was reversed by the Appellate Division on appeal. (*Ockes* v. *Massey*, 94 App. Div. 165.) Upon the second trial the court found the facts substantially as above stated and ordered judgment in favor of the defendant upon the ground that the seventh clause of the will was residuary in character and that thereby the testator gave the shares of stock in question to his wife absolutely. The Appellate Division affirmed unanimously, and the plaintiff appealed to this court.

E. C. Emerson for appellant. The limitation for life contained in the second clause of the will applied to all the property mentioned in that clause and limited the estate bequeathed to the lifetime of the widow. (*Areson* v. *Areson*, 3 Den. 458; 5 Hill, 410; *Place* v. *Burlingame*, 75 Hun, 432; 149 N. Y. 617; *Lambert* v. *People*, 76 N. Y. 220; *Coxson* v. *Doland*, 2 Daly, 66; *Matter of Beach*, 1 Misc. Rep. 29; *Smith* v. *Van Nostrand*, 64 N. Y. 278.) The estate thus granted having been clearly limited to the life of the testator's wife, such limitation cannot be destroyed by construction and the estate granted turned into a fee. (*Norris* v. *Beyea*, 13 N. Y. 273; *Sweet* v. *Chase*, 2 N. Y. 73; *Trustees* v. *Kellogg*, 16 N. Y. 88; *Taggart* v. *Murray*, 53 N. Y. 233; *Van Vechten* v. *Keator*, 63 N. Y. 52; *Everett* v. *Everett*, 29 N. Y. 83; *Chrystie* v. *Phyfe*, 19 N. Y. 348; *Van Nostrand* v. *Moore*, 52 N. Y. 12; *Roseboom* v. *Roseboom*, 15 Hun, 315.) There was in this case no such inconsistency between the provisions of the will as would destroy the limitation contained in the second clause in case the residuary clause was given full effect, nor did the residuary clause by apt, clear and decisive words assume to remove that limitation. (*Roseboom* v. *Roseboom*, 81 N. Y. 356; *Banzer* v. *Banzer*, 156 N. Y. 429; *Clarke* v. *Leupp*, 88 N. Y. 228; *Freeman* v. *Coit*, 96 N. Y. 67; *Goodwin* v. *Coddington*, 154 N. Y. 286; *Benson* v. *Corbin*, 145 N. Y. 351; *Byrnes* v. *Stillwell*, 103 N. Y. 453.) The presumption that a residuary clause disposes of all remainders that are otherwise undisposed of has no application to this case. (*Floyd* v. *Carew*, 88 N. Y. 560; *Lamb* v. *Lamb*, 131 N. Y. 227; *Matter of Allen*, 151 N. Y. 249; *Kerr* v. *Dougherty*, 79 N. Y. 328; *Morton* v. *Woodbury*, 153 N. Y. 256; *Matter of Wolley*, 78 App. Div. 225; *Smith* v. *Smith*, 141 N. Y. 34; *Carpenter* v. *Carpenter*, 2 Dem. 534; *Stimson* v. *Vrooman*, 99 N. Y. 79.) The language of the residuary clause shows that the testator did not intend it should apply to the remainder in the property mentioned in the second clause. (*Roe* v. *Avis*, 4 D. & E. 604; *Leggett* v. *Firth*, 132 N. Y. 7; *Moffett* v. *Elmendorf*, 152 N. Y. 475.)

Harvey W. Steele and *Joseph Atwell* for respondent. The will should be construed, if possible, to avoid intestacy as to any property or interest in property of the testator. (*Bates* v. *Hillman*, 43 Barb. 645; *Thomas* v. *Snyder*, 43 Hun, 14; *Zone* v. *Zone*, 4 Misc. Rep. 559; *Ball* v. *Dixon*, 83 Hun, 344; *Haight* v. *Pine*, 3 App. Div. 434; *Shangle* v. *Halleck*, 6 App. Div. 55; *Vernon* v. *Vernon*, 53 N. Y. 351; *Shult* v. *Moll*, 132 N. Y. 122; *Johnson* v. *Brasington*, 156 N. Y. 187; *Ward* v. *Stannard*, 82 App. Div. 386.) Under the residuary clause of the will, all real and personal property, or interest in real and personal property owned by the testator at the time of his death, other than that specifically devised or bequeathed in said will, passed to his wife absolutely. (*Smith* v. *Smith*, 31 App. Div. 598; *Delehanty* v. *St. V. O. Asylum*, 56 Hun, 55; *House* v. *Raymond*, 3 Hun, 44; *Wyman* v. *Woodbury*, 86 Hun, 227; *Matter of Hodgman*, 69 Hun, 484; *Morton* v. *Woodbury*, 153 N. Y. 243; *Gilman* v. *Reddington*, 24 N. Y. 9; *Powers* v. *Cassidy*, 79 N. Y. 602; *Floyd* v. *Carow*, 86 N. Y. 560; *Lamb* v. *Lamb*, 131 N. Y. 227.) The claim of plaintiff, that the testator intended that the residuary clause of his will should apply only to after-acquired property cannot be sustained. (*Tilden* v. *Green*, 130 N. Y. 51.)

VANN, J. The question presented for decision is whether the testator intended by the seventh clause of his will to include the property mentioned in the second clause and thus to destroy the limitation in the latter by making the gift absolute instead of for life only. The question is difficult, and it is but natural that learned judges should differ as to the solution. We appreciate the able argument of the Appellate Division and should be glad to follow it, but the law requires us to decide the case upon our own judgment, and if in our opinion the weight of reason is on the side of the appellant, even if the preponderance is slight, he is entitled to a reversal of the judgment against him. The sole question is, what did the testator intend, and, while there is no difference of opinion as to the legal principles to be used as guides to learn his

intention, there is serious difference as to what he meant, even after these principles have been applied.

It is conceded by both parties that the limitation at the close of the second clause applies to all the property mentioned therein, both real and personal, and that the effect thereof, if it stood alone, would limit the gift to the life of the widow. In reading the will we thus start with a limitation which could not be more simply expressed, nor could it be more plain, clear and unmistakable in its meaning. Such a limitation cannot be nullified by construction on the theory that where clauses are antagonistic the later must stand as the last expression of intention, because that theory rests only upon necessity and is never applied unless the last clause is as clear as the first, and cannot be reconciled therewith. It is only when the later provision is as plain and decisive as the earlier; when the real intent of the testator cannot be gathered from the general scope of the will or otherwise, and when the two provisions are wholly irreconcilable and cannot possibly stand together, that, as a desperate remedy, resort is had to the last clause as expressing the latest intent in order to save one instead of sacrificing both. (*Roseboom* v. *Roseboom*, 81 N. Y. 356, 359; *Van Nostrand* v. *Moore*, 52 N. Y. 12, 20; *Trustees Theological Seminary of Auburn* v. *Kellogg*, 16 N. Y. 83, 88; *Banzer* v. *Banzer*, 156 N. Y. 429; *Goodwin* v. *Coddington*, 154 N. Y. 283.) While these cases relate to a change by cutting down an estate previously granted, the same principle applies to a change by which a limitation to life is converted into an absolute estate in favor of the same person, resulting in the disinheritance of the heir at law. "The legal presumption is that when a testator devises less than his whole interest, he knows that the law gives the remainder to his heirs." (*Areson* v. *Areson*, 3 Den. 458, 464.)

If there is no doubt as to the meaning of the earlier clause, while there is doubt as to the meaning of the later, so that either of two constructions is possible, that construction will be adopted which will give effect to both. Doubt as to the

meaning of the last clause, instead of destroying the limitation in the first, confirms it. An express limitation cannot be cut down by a clause of doubtful meaning.

With these principles in mind, a comparison of the two clauses in the light of the other provisions of the will shows that they are not so repugnant that they cannot be reconciled. Referring to them for convenience as the first and last clauses, we find that the first admits of no discussion, for it can have but one meaning which is manifest upon the first reading. The last clause, unlike the first, contains no words appropriate to the disposition of real estate. This is not without significance even in a will drawn by a layman, who, down to the last clause, at least, used the word "devise" when speaking of real estate, and the words "give and bequeath" when speaking only of personal property. While a "devise" ordinarily passes real estate, and a "bequest" personal property, still it is important to note that the testator was conscious of the distinction between these words and used them with an accurate and discriminating meaning. Although it is evident that he was somewhat familiar with the technical language of well-drawn wills, although he did not always use it accurately, we find no word in the last clause which is commonly used to dispose of the residuum of an estate such as rest, residue or remainder. He does speak of "any other property not herein otherwise before disposed of" that might be in his possession at the time of his decease, and the property mentioned in the first clause had not been completely disposed of as only a life interest therein had been given. He did not, however, necessarily refer to that property, for he may have meant the money in bank, amounting to over $1,500, which had not been disposed of, and to property that he might acquire thereafter. Both money on deposit, varying in amount from day to day, and after-acquired property might well be referred to as that which "may be in my possession at the time of my decease," for it could not be specifically described, and down to the last clause specific description had been the rule of action. He used the same expression in the first clause when referring

to his horse, cow, carriages and other articles subject to frequent change, showing his care when there was any doubt in his mind as to what property would be in his possession at the time of his decease. While he may have intended to include everything, not only the money in bank and property that he might acquire, but also that which was enumerated in the first clause, his language does not compel that construction. It permits the inference that in writing the words "before disposed of," under the circumstances, he meant "before mentioned," although that would not be their ordinary meaning if they stood alone.

But, reading on, we at once reach language which throws much light upon the meaning of the last clause, because the testator states his object in writing it. He declares that object to be "first to liquidate any indebtedness that may be against me" and second, "the balance, if any, to be at" the sole disposal of his wife. The primary object of the clause as unmistakably declared by the testator, was to pay his debts and the secondary object to give the balance, after expressing a doubt whether there would be any, to his wife. If he intended by this language that the money in bank and the property that he might subsequently acquire should be devoted to this purpose, it would be natural and reasonable and the doubt as to whether there would be any left would not seem strange. If, however, he meant to make the last clause a general residuary clause and to thereby require that the remainder created by giving the homestead to his wife for life, and the personal property, subject to a life interest of his wife therein, should be sold to pay his debts, we encounter practical difficulties of a serious character. What would the property, real or personal, bring if sold under such circumstances? Is it reasonable to believe that a practical man of affairs intended any such result? He apparently thought that the property devoted to the payment of his debts might be thereby exhausted and that there might not be any balance for his wife. Did he intend that the remainder created by the first clause should be sold and that his daughter,

upon the death of her mother, already an old woman, should be turned out of the home where she had always lived? He had not provided her with means to bid in the remainder when sold to pay his debts and so far as appears neither herself nor her husband was in a situation to purchase it. While he gave $60,000 to charity, $10,000 to his sisters, and, according to the contention of the defendant, property worth over $20,000 to his wife, besides an annuity of $2,500 for life, he gave but $2,000 to his daughter, together with an annuity of $2,000 to commence on the death of her mother. Thus, according to the theory which has thus far prevailed, he left his only child, an invalid, who had always lived with him, no means of protecting herself from being turned out of doors upon the death of her mother, and deprived her even of the horse and carriage which she needed in order to get about. He may have expected her mother to look out for her, but there is no evidence that he did, and we have no right to assume that he did. He may have thought that his daughter would not survive her mother, but we cannot act on mere conjecture. When the whole will is read together in the light of the circumstances surrounding the testator when he wrote it, is it reasonable to conclude that he intended to cause the homestead to be sold away from his daughter if she survived her mother? Did he intend to turn the family home, furniture, beds, bedding, horse, cow and all the articles used by himself, his wife and child in their daily life for so many years into a fund to pay his debts, when he was a man of ample means and had an abundance of salable personal property to use for that purpose? Did he intend to break up his daughter's home in order to exonerate his gifts to charity and to collateral relatives from the payment of his debts? The presumption is that his debts were not large, for he was in no business and he had $1,500 in bank and valuable personal property which could be turned into money without sacrifice or delay. The property described in the earlier clause was worth over $15,000. When the testator died his wife was seventy-six years old, and, according to the Northampton tables, her life estate was worth about $3,500,

and the remainder about $11,800. Did he intend that the remainder, which was actually worth three times as much as the life estate, should be sold, subject to the life estate, for the comparatively small sum it would be apt to bring under such circumstances? Who but a speculator would bid on it? The risk of not getting the property until the outstanding life fell in would make the investment very undesirable, and is it probable that the testator would devote so much property to the payment of his debts when it could not be utilized for that purpose without sacrifice, and the sale of which might cause such inconvenience to his only child? He makes his intention clear in the first clause, and if he intended to change it in the last why did he not say so in plain terms?

We think that the last clause, to say the least, is ambiguous and, hence, open to either of the two constructions suggested. What reason is there for adopting the construction that would destroy the limitation for life, disrupt the general scheme of the will and lead to results so inconvenient and unjust as to make it improbable that they were intended by the testator?

The argument in favor of the respondent rests mainly on three presumptions: 1. That a general residuary clause carries with it all reversionary interests and remainders. 2. That the testator intended to dispose of all his estate and to die intestate as to no part thereof. 3. That if the property went to his wife it would in the ordinary course of nature ultimately reach his relatives and heirs and not pass through his son-in-law to strangers to his blood.

These presumptions are founded upon presumed intention and always yield to the actual intention when it can be gathered from the entire will. The last clause is not in form a general residuary clause, although it might be held such and standing alone doubtless would be. The reasons for giving it a limited instead of a general effect have already been set forth.

The presumption against intestacy is met by the presumption against disinheriting the heir and assuming them to be of equal strength they neutralize each other. (*Bumpus* v.

Bumpus, 79 Hun, 526, 530.) While it might be argued that the former is artificial and that the latter is founded in the strong natural love of parent for child, still it is doubtful if either party has any decided advantage from these presumptions.

The last presumption is founded on a natural desire and is not without force, but it is attended with too many uncertainties to make it of great value. It should also be said that there is no evidence that the testator did not have full confidence in his son-in-law and, indeed, when appointing his wife as executrix, he recommended her to take his advice and counsel.

Giving adequate force to all presumptions and to the argument of both parties resting on the general scope and the real meaning of the will when all its provisions are read together, as well as upon the surrounding circumstances, we are of the opinion that the testator did not intend to destroy the limitation in the first clause and that he intended by the last clause to include only the money on deposit and such property as he expected to acquire after he wrote his will. This conclusion requires us to reverse the judgment appealed from and to order a new trial, with costs to abide event.

CULLEN, Ch. J., O'BRIEN and WILLARD BARTLETT, JJ., concur; HAIGHT and WERNER, JJ., dissent; HISCOCK, J., not sitting.

Judgment reversed, etc.

COURTNEY S. COLLINS, Appellant, *v.* JOHN L. RUSSELL et al., Respondents.

TENANCY BY CURTESY. An estate by the curtesy does not attach to property conveyed to a wife subject to the use and occupation of another during life, where she was never in actual possession of the property and she died before the termination of the life estate.

Collins v. *Russell*, 96 App. Div. 136, affirmed.

(Submitted January 19, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered

August 27, 1904, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

T. W. McArthur and *F. M. Starbuck* for appellant. A tenancy by the curtesy arises upon the death of a wife seized of a vested remainder acquired by deed. (*Van Rensselaer* v. *Poucher*, 5 Den. 35; *Wendell* v. *Crandall*, 1 N. Y. 491; *Jenkins* v. *Fahey*, 73 N. Y. 355; *Durando* v. *Durando*, 23 N. Y. 331; *Ferguson* v. *Tweedy*, 43 N. Y. 543; *Adair* v. *Lott*, 3 Hill, 182.

A. H. Jones and *J. S. Russell* for respondents. Mary Collins was never seized of the premises and the plaintiff is not tenant by the curtesy. The life estate was not ended during coverture. All Mary Collins received by the deed was a remainder. The life estate of Angelina Russell was a bar to this action. (Coke Litt. 29A, 32A; 3 Atk. 469; 4 Kent's Com. 29; 1 Barb. 106; 1 Paige, 634; 5 Paige, 469; *Tayloe* v. *Gould*, 10 Barb. 388; Tiedeman on Real Prop. §§ 106, 107; *Moore* v. *Littel*, 41 N. Y. 66; *Gentry* v. *Wagstaff*, 14 N. C. 278; *Baker* v. *Flournoy*, 58 Ala. 650; 15 Am. & Eng. Ency. of Law, 818; *Trolan* v. *Rogers*, 79 Hun, 507; *Ferguson* v. *Tweedy*, 43 N. Y. 543; *Webster* v. *Ellsworth*, 147 Mass. 602; *Todd* v. *Oviatt*, 58 Conn. 174; *Schores* v. *Charley*, 8 Allen, 423; *Planter's Bank* v. *Davis*, 31 Ala. 626; *Williams* v. *Paige*, 71 Penn. St. 476.) Actual seizin by the wife is necessary where she gets her title by a deed which creates at one and the same time and by one and the same act an estate for life in another person. (*Anderson* v. *Carr*, 6 App. Div. 6; *Jenkins* v. *Fahey*, 73 N. Y. 357; *Bear* v. *Snyder*, 11 Wend. 593; *Leach* v. *Leach*, 21 Hun, 382; *Durando* v. *Durando*, 23 N. Y. 331; *House* v. *Jackson*, 50 N. Y. 161; *Powers* v. *Jackson*, 57 N. Y. 654.)

O'BRIEN, J. This action is brought by a husband to recover possession of certain premises, which he claims as tenant by the curtesy. The defense is that the wife was not actually seized of the premises during her lifetime and that, therefore, the estate in curtesy did not attach.

By the deed which conveyed the property to the wife there was conveyed to another party a life estate therein. It does not appear that the wife was ever in actual possession of the property; since the life tenant survived her, and it is assumed, as I understand the case, that the wife was never in actual possession of the property. The wife died before the termination of the life estate, and hence the only interest that she ever had in the land was an estate in remainder.

Curtesy is a common-law estate and recognized by the laws of this state. It gives to the husband a life estate in the lands of which his wife died seized. In Washburn on Real Property (6th ed. §§ 328, 335) it is said that "the husband's curtesy is in many respects but a continuation of the estate of the wife," and "if the estate of the wife be one in reversion or remainder, subject to a prior freehold estate in another, her constructive seizin of such reversion will not entitle her husband to curtesy, unless the prior freehold determine during coverture." In this case the life estate referred to continued until long after the death of the plaintiff's wife and the latter was never in possession. The other conditions upon which the estate in curtesy depends existed, that is, the marriage, the birth of a child and the death of the wife.

The plaintiff's complaint was dismissed at the trial and the judgment has been affirmed at the Appellate Division. We think that the appeal cannot be sustained, since actual seizin in the wife is necessary in order to vest the husband with the estate in curtesy.

In *Ferguson* v. *Tweedy* (43 N. Y. 543) it was held that, as a general rule, actual seizin of the wife during coverture is necessary to a tenancy by the curtesy; that where there is an outstanding estate for life the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder

unless the particular intervening estate terminate during coverture. This rule has been relaxed somewhat in respect to wild and uninclosed lands, but in a case like the present it seems to remain as above stated.

In *Carr* v. *Anderson* (6 App. Div. 6) it was held that the essential element of a tenancy by the curtesy exists in the fact that the wife had actual seizin of the lands during coverture based upon an actual entry upon the same — one which requires or gives an occupation as a demonstrative thing, and if the wife never made an entry upon the lands, the husband had no tenancy by the curtesy. It is claimed by the appellant that a distinction exists where the wife's estate is by deed instead of by inheritance, and in *Adair* v. *Lott* (3 Hill, 182) it was held that the rule did not apply where the wife took by deed. No such distinction is to be found in the later decisions in this state, and an examination of the *Adair* case discloses that the court determined that there was actual, as well as legal seizin in the wife. The question is fully discussed in the learned opinion below and in the two cases that we have cited, and further discussion would seem to be unnecessary.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Judgment affirmed.

WILLIAM E. BURKE, Respondent, *v.* THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK, Appellant.

FIRE INSURANCE — NO RECOVERY FOR LOSS OF PROPERTY HELD AS BAILEE WHERE THE LATTER IS NOT RESPONSIBLE TO OWNER. After insuring as the absolute owner a stock of glass then on hand, under a policy covering "his own or held by him in trust, or sold but not delivered, for which he may be held liable," the insured sold and delivered the glass, agreeing also that all glass to be manufactured by it within a specified time should become the property of the vendee as soon as manufactured, and should be subject to the latter's orders as to shipment; in the meantime it should be stored in the warehouses of the

insured, which were leased to the vendee for that purpose; the insured assumed the responsibility for any loss or damage except "loss by fire," and "said glass" was to be insured by the vendee, the former, however, agreeing to pay the premiums; thereafter the property was destroyed by fire. In an action upon the policy by an assignee of the insured, *held*, that the vendee was vested with the title and entire insurable interest in the property in case of loss by fire, and that it was its duty to take out the policy in its name, the insured paying the premiums; that the fact that the latter was the custodian or caretaker of the property did not establish that it was held "in trust" within the meaning of the policy, for the reason that those words apply only to those cases of bailment where the bailee is responsible to the owner, while here the insured was expressly relieved from any responsibility in case of fire, and, therefore, the plaintiff could not recover.

Burke v. *Continental Ins. Co.*, 100 App. Div. 108, reversed.

(Argued January 29, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 12, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. H. Metcalf and *Clarence M. Bushnell* for appellant. The agreement between the glass companies was an absolute, unconditional change in the interest, title or possession of the subject of insurance and voided the policy. (*G. L. Ins. Co.* v. *H. Ins. Co.*, 144 N. Y. 195; *Walton* v. *A. Ins. Co.*, 116 N. Y. 317; *Rosenstein* v. *T. Ins. Co.*, 79 App. Div. 481.)

Moses Shire for respondent. The D. O. Cunningham Company had an insurable interest in the property destroyed by fire April 3, 1901. (*Stilwell* v. *Staples*, 19 N. Y. 403; *Berry* v. *A. C. Ins. Co.*, 132 N. Y. 49; *C. Ins. Co.* v. *U. C. Co.*, 133 U. S. 387; *Foley* v. *M. F. Ins. Co.*, 152 N. Y. 131; *Water* v. *M. F. & L. Ins. Co.*, 5 El. & Bl. 870.)

EDWARD T. BARTLETT, J. This action was brought to recover on a policy of fire insurance for $2,500 issued by the

defendant to the D. O. Cunningham Glass Company of Pennsylvania, a corporation engaged in the manufacture of glass at Pittsburg. The plaintiff sues as the assignee of the above company. The only defense now insisted upon is that the Cunningham Company fraudulently misrepresented that it owned the glass claimed in its proofs of loss, and, therefore, the defendant was not liable.

The policy was issued on the 4th of May, 1900, for the term of one year for "$2,500 on stock of window glass and packages containing the same, his own, or held by him in trust, or sold but not delivered, for which he may be held liable; all while contained in any or all of the brick and frame buildings, and on premises of the assured occupied for the manufacture of window glass, situate bounded on the north by James street, on the east by S. 27th street, on the south by Mary street, on the west by S. 26th street, Pittsburg, Pennsylvania." A fire occurred on April 3rd, 1901, and the property described in the policy was lost or damaged to the amount of $4,646.62. The proportion of the loss payable under the policy here involved was $129.43, there being other companies on the risk. It is claimed by the defendant that, notwithstanding the small amount involved in this action, the question is of importance.

After the issue of this policy, and on the 19th of December, 1900, the D. O. Cunningham Glass Company, as party of the first part, entered into a written agreement with the Independent Glass Company, as party of the second part, a corporation created under the laws of the state of New Jersey, which was "incorporated for the purpose of conducting and carrying on the business of buying, selling, operating and dealing in window-glass and other business incident thereto." Among other provisions in said agreement are the following: "That the said party of the first part in consideration, etc., has bargained and sold and does hereby bargain and sell unto the party of the second part all window-glass which said party of the first part has heretofore manufactured, and has on hand at the date hereof, or was manufactured or caused to be

manufactured during the year ending December 31st, 1902, at the price," etc.

"All said glass to be delivered and become the property of the party of the second part as soon as manufactured; the same to be delivered on cars, or shipped on the orders of the party of the second part, or stored in the warehouses or elsewhere on property of the party of the first part for shipment thereafter by the party of the first part upon orders or directions given by the party of the second part, and for this purpose the said party of the first part does hereby lease and let unto the party of the second part, for the purpose of storing its glass as aforesaid at a rental of one dollar, its warehouse or warehouses, or other buildings in which the same may be stored, situate at Pittsburg, Pennsylvania. * * * The said party of the first part shall until said glass is subsequently shipped upon the orders of the said party of the second part, be responsible and liable for and charged with the custody and safety of the glass so to be stored in the warehouse or buildings aforesaid, and with any and all loss thereof or damage thereto, except *loss by fire.* * * * Said glass shall be insured by the party of the second part, the premiums of insurance, however, shall be paid by the party of the first part."

The appellant argues that the agreement between these companies was an absolute and unconditional change in the interest, title and possession of the subject of insurance, and rendered the policy void. Also, that the words in the policy, "his own or held by him in trust, or sold but not delivered, for which he may be held liable," do not permit an absolute sale and delivery as was made to the Independent Glass Company. The situation after the execution of the agreement is briefly this: The Cunningham Company sold absolutely and delivered to the Independent Glass Company all the glass it then had on hand, and, further, all the glass it should make from the date of the agreement until the 31st of December, 1902, was to become the property of the Independent Glass Company as soon as manufactured. This manufactured prod-

uct was to be shipped to the Independent Company from time to time according to its directions, and in the meantime was to be stored in the warehouses of the Cunningham Company, which were leased to the Independent Company at a rental named for this purpose. The Cunningham Company had the title to no glass whatever manufactured or to be manufactured, and all glass was stored in warehouses leased by it to the Independent Company. The sole interest remaining in the Cunningham Company was that they were "responsible and liable for and charged with the custody and safety of the glass so to be stored in the warehouse or buildings aforesaid, and with any and all loss thereof or damage thereto, except *loss by fire.*" Its custody of the property was that which vests in any watchman or caretaker. The glass was to be insured by the Independent Company, but the premiums paid by the Cunningham Company. As caretaker the Cunningham Company was charged with the custody and safety of the glass so stored, and with any and all loss and damage thereto, except by fire. If any of the glass had been stolen by a person breaking into the building and carrying it away, or if a trespasser upon the premises had broken or destroyed any portion of the glass, the Cunningham Company would have been liable, and to the extent of that interest in the property it could have insured against the loss in any company taking such a risk. To say that the Cunningham Company under these circumstances could insure against loss and damage by fire is to ignore the plain provisions of this agreement, as it could suffer no loss by the destruction of the glass by fire.

The policy undoubtedly contemplates certain changes in title of the property which was originally insured by the Cunningham Company as absolute owner. It is first provided that if it is held "in trust" the insurance remains good. The words "in trust" have been given a very broad and liberal construction by this court, and it was held that they "are not to be taken in any strict technical sense, which would limit their operation to cases where the title to goods had been

vested in a trustee subject to some specific trust to be executed by him. * * * The words 'in trust' may, with entire propriety, be applied to any case of bailment where the goods belonging to one person are entrusted to the care of another, for which the bailee is responsible to the owner." (*Stillwell* v. *Staples*, 19 N. Y. 401, 403.) The controlling words in the above quotation are "for which the bailee is responsible to the owner." In the case before us if there had been a loss by theft or through the careless or malicious act of a trespasser, the Cunningham Company was responsible to the owner under such conditions as caretaker. It cannot, however, be said, under a reasonable construction of the agreement, that the Cunningham Company held this in trust for the Independent Company so as to enable it to recover in case of loss by fire. It had no title to the property; it had leased its warehouses for the storage of the same, and rested only under a very limited liability. The next provision of the policy covers property "sold but not delivered" for which the insured is liable. This property had been both sold and delivered. We are of opinion that the Independent Company was vested with the title and entire insurable interest in this property in case of loss by fire; that it was its duty under the express provisions of the agreement to take out the policy of insurance in its name, the Cunningham Company paying the premiums.

The judgments of the Trial Term and Appellate Division should be reversed, new trial ordered, costs to abide the event.

CULLEN, Ch. J., GRAY, O'BRIEN, WERNER and CHASE, JJ., concur; HISCOCK, J., not sitting.

Judgments reversed, etc.

ISIDOR WORMSER, JR., Appellant, *v.* METROPOLITAN STREET RAILWAY COMPANY et al., Respondents.

STOCKHOLDER'S ACTION — STOCKHOLDER CANNOT COMPLAIN OF ALLEGED ULTRA VIRES ACTS AFTER HE HAS TAKEN BENEFITS THEREUNDER. Where the objection to the acts or plans of a corporation is that they are *ultra vires*, without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an equitable action in his own behalf, based on such objection, to restrain the corporation from carrying out such acts, or plans, and to have the same set aside as illegal and void, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder; and such a defense is available notwithstanding the fact that the plaintiff did not receive such pecuniary benefits until after the commencement of the action.

Wormser v. *Metropolitan St. Ry. Co.*, 98 App. Div. 29, affirmed.

(Argued January 16, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 28, 1904, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

In February, 1902, the president of the Metropolitan Street Railway Company communicated in writing to the stockholders of that corporation a plan for providing money (approximately $23,000,000) to pay its unfunded debt incurred in the purchase of stock of the Third Avenue Railroad Company and to defray the expense of extending its electrical system to eighty miles of railroad lines still operated by horsepower. That communication stated the plan or proposition as follows: A corporation known as the Metropolitan Securities Company had been organized under the laws of New York, with a capital stock of $30,000,000, all of which had been underwritten at par by Messrs. Kuhn, Loeb & Co., conditioned upon the ratification of the lease hereinafter mentioned.

The Metropolitan Securities Company had acquired all the outstanding capital and stock and other securities of the Interurban Street Railway Company, a corporation with an

authorized capital stock of $20,000,000, owning and controlling franchises for the construction and operation of street railroads on an extensive mileage in the borough of The Bronx and adjacent territory. An agreement had been entered into between the Metropolitan Securities and the Interurban Street Railway Company, whereby the Securities Company was to pay into the treasury of the Interurban Company at least $23,000,000 in cash, receiving in return stock of the Interurban Company at par and interest-bearing four per cent debentures.

An agreement or lease had been entered into, subject to the approval of the stockholders, between the Metropolitan Street Railway Company as lessor and the Interurban Street Railway Company as lessee, whereby, among other things, the lessee agreed (1) to assume the fixed charges of the Metropolitan Street Railway Company and unconditionally guarantee seven per cent per annum upon the entire amount of its capital stock, payable quarterly; and (2) to pay $23,000,000 into the treasury of the Metropolitan Street Railway Company in return for the securities which should be liberated by the payment of the unfunded debt, and other almost entirely unproductive assets, said sum of money to be expended in liquidating the unfunded debt and in completing the electrical equipment of the Metropolitan system, and to be paid as required for those purposes.

As a part of the proposed arrangement, the stockholders of the Metropolitan Street Railway Company were to be accorded the privilege of subscribing at par for an amount of the stock of the Metropolitan Securities Company equal to forty-five per cent of the par value of the capital stock of the Metropolitan Street Railway Company; that is to say, they were to be allowed to subscribe for $23,400,000 of such stock out of the total capital of $30,000,000.

It was also proposed, in connection with the foregoing plan, that the Metropolitan Street Railway Company should create a refunding mortgage, the details of which arrangement it is unnecessary to state, as they are not material here.

The said communication of the president of the Metropolitan Street Railway Company also stated, as was the fact, that a meeting of the stockholders had been called for March 20th, 1902, to act upon the agreement or lease with the Interurban Street Railway Company, and to authorize the proposed refunding mortgage.

At a meeting of the stockholders of the Metropolitan Street Railway Company the lease and plan were assented to by a large majority of the stockholders, and thereafter ninety-nine per cent of all the stockholders, including those who voted at the meeting, acquiesced in the arrangement which was thereafter carried out.

The present suit is an action of equitable nature, brought by a stockholder of the Metropolitan Street Railway Company on behalf of himself and all other stockholders of the corporation similarly situated who may elect to come in, to enjoin the Metropolitan Street Railway Company and the Interurban Street Railway Company, their officers and agents, from carrying out the said lease, plan or arrangement, and to have the same set aside as illegal and void. The complaint attacks the scheme as fraudulent in fact, and assigns four specifications of fraud as follows: (1) That the proposed lease is fraudulent because it limits the rent to seven per cent on the Metropolitan stock, while the actual earnings of the Metropolitan Company are alleged to exceed seven per cent, and will in the near future, as the plaintiff believes, exceed ten per cent; (2) that the Interurban Company has no sufficient property to secure the payment of the seven per cent guaranteed by it, nor does it possess any property or means from which said rental can be paid; (3) that the obligations of the Metropolitan Company to the citizens of the borough of Manhattan for conveying passengers therein cannot legally be devolved upon the Interurban Company; and (4) that the privilege offered to the stockholders of the Metropolitan Street Railway Company to subscribe to the stock of the Metropolitan Securities Company is in effect a bribe.

At the time of the commencement of this suit the plaintiff

owned a thousand shares of the stock of the Metropolitan Street Railway Company. Before the answer was interposed he exercised the option, conferred upon the Metropolitan Railway stockholders by the aforesaid plan, of subscribing to the capital stock of the Metropolitan Securities Company in respect of 885 of his shares, and sold his option or privilege to third parties, receiving therefor over $5,000.

The answers of the defendants denied all allegations of fraud and set up the exercise of this option by the plaintiff as a separate defense. No other stockholder joined with the plaintiff in the prosecution of the suit. Upon the trial of the case at Special Term judgment was rendered dismissing the complaint upon the merits, and findings were made which negative all charges of actual fraud. The judgment of the Special Term was unanimously affirmed by the Appellate Division.

Francis K. Pendleton and *Albert Stickney* for appellant. The right to rescission is not barred by the fact that the plaintiff and other objecting stockholders availed themselves of the privilege of subscription to the stock of the Securities Company, such subscription having been made after the commencement of this action without full knowledge of the facts constituting the fraud herein complained of, and being made under compulsion for the purpose of preserving their right to the revenues of their own properties. Moreover, plaintiff never exercised such privilege as to the stock standing in his individual name. (Bigelow on Estoppel [5th ed.], 686; *Potter* v. *Brown*, 50 Mich. 436; *Cincinnati* v. *Cameron*, 33 Ohio St. 336; *Nye* v. *Swan*, 49 Minn. 431; *Merritt* v. *Bissell*, 155 N. Y. 396; *Boerum* v. *Schenck*, 41 N. Y. 182; *Ayres* v. *Probasco*, 14 Kan. 175.)

Charles F. Brown, *Paul D. Cravath* and *William D. Guthrie* for respondents. The plaintiff, having accepted the benefits of the plan by availing himself of the privilege of subscribing to the stock of the Metropolitan Securities Com-

pany, is now precluded from attacking it. (*I. C. Co.* v. *Lamont*, 155 U. S. 303; *Towers* v. *A. T. Co.*, L. R. [1 Ch. 1904] 558; *Post* v. *B. V. P. & E. Co.*, 84 Fed. Rep. 371; *Barr* v. *N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 263; *McNab* v. *McN. & H. Mfg. Co.*, 62 Hun, 18; *Matter of Peaslee*, 73 Hun, 113; *Clearwater* v. *Meredith*, 1 Wall. 25; *Straus* v. *A. P. Assn.*, 45 Misc. Rep. 251; *Lyon* v. *Brooks*, 2 Edw. Ch. 110; *Carpenter* v. *Bell*, 1 Robt. 711, 716; *Turner* v. *Robinson*, 1 S. & S. 3.)

WILLARD BARTLETT, J. Where the objection to the acts of a corporation is that they are *ultra vires*, without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi-estoppel, as Mr. Bigelow puts it (Bigelow on Estoppel [4th ed.], chap. XIX), or be denominated merely an acquiescence or an election, or the assumption of a position inconsistent with an attack, makes no essential difference here. The point is, that the seeking and acceptance of a substantial benefit which would be unavailable to the stockholders except as a result of the acts which he would attack as *ultra vires* preclude him from assailing those acts on that ground. A litigant is not at liberty to deny the validity of a contract, which is neither prohibited by law nor evil in itself, after he has knowingly sought and obtained pecuniary advantages, pay or compensation, under and by virtue of such contract.

This doctrine applies to the present case and is conclusive against the maintenance of this action by the plaintiff. He has sold the privilege attaching to 885 of his Metropolitan Railway Company shares to subscribe to the stock of the Metropolitan Securities Company for between $5,000 and $6,000. This privilege would have been absolutely non-existent, except for the plan and lease which he attacks in this

suit. He was well aware of this and he cannot avail himself of the privilege and at the same time prosecute the suit.

The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied. (*Holmes* v. *Willard*, 125 N. Y. 75, 82.)

In *Post* v. *Beacon Vacuum Pump & Electrical Co.* (84 Fed. Rep. 371) the United States Circuit Court of Appeals in the First Circuit considered the sufficiency of a bill in equity filed by stockholders of the Beacon Vacuum Pump and Electrical Company to rescind a transfer of its property to the Beacon Lamp Company; and it was held that the complainants being minority stockholders who opposed the transfer were estopped from maintaining a suit for rescission on the ground of *ultra vires*, because they had subscribed for their proportion of the stock of the new corporation, although under protest, and had permitted such company to conduct the business for eighteen months. "It is clear," said PUTNAM, C. J., "that the complainants have not maintained that consistent position necessary to relieve them against an equitable estoppel. They admit that they have subscribed for their proportion of the 32,000 shares of stock in the new corporation. They do not state the date when they made the subscription. The transfer of the assets to this corporation was made in July, 1895, and the bill was not filed until the 12th day of January, 1897, so that, although at the outset they protested against the reorganization, yet their subscriptions, in the absence of any proper allegation otherwise, must be presumed to have been made at such time as justified the respondents in assuming that the lamp company was authorized, so far as the complainants were concerned, to receive the transfer of the property of the old corporation, and to commence and carry on its manufacturing business, thus involving itself in the liabilities and other complications inevitably arising therefrom. *That this raised an estoppel in equity as against a bill praying rescission is too clear to*

need discussion. It is true that complainants allege that this subscription was under protest, and only to preserve their rights; but the bill does not give the court any details which would enable it to perceive that, by any possibility, the effect of the subscription, which of itself would be an accomplished fact, could be overcome by any protest or other formal reservation which might accompany it."

In *Towers* v. *African Tug Company* (L. R. [1 Ch. 1904], 558), which was a suit by two shareholders of the defendant to compel the directors to repay to the company the amount of a dividend illegally, though honestly, declared and paid, the decision of the English Court of Appeal is accurately stated in the head note as follows: "A shareholder in a limited company who has, with full notice or knowledge of the facts, himself received part of the proceeds of an *ultra vires* act committed by the directors — such as payment of a dividend out of capital — and who still retains the money, cannot, either individually or as suing on behalf of the general body of shareholders maintain an action against those directors." Lord Justice VAUGHN-WILLIAMS, in the course of his opinion, says: "If it be the fact, as I think it is, that these plaintiffs knew of all that had been done, received their dividends with knowledge of all the facts, and then brought this action with the money still in their pockets, ought they to be allowed to bring this action, which, as I have pointed out, is, to my mind, an action such as they can bring in consequence of their personal interest in the matter? I think not. I think that an action cannot be brought by an individual shareholder complaining of an act which is *ultra vires* if he himself has in his pocket at the time he brings the action some of the proceeds of that very *ultra vires* act. Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say he ought not to bring such an action equally requires us to say that he ought not to be the peg upon which such an action is to be hung for the benefit of others."

The proposition that one may not deny the validity of a contract under which he has taken advantages was forcibly asserted by the Supreme Court of the United States in the case of *United States ex rel. International Contracting Co.* v. *Lamont* (155 U. S. 303). There the relator applied for a writ of mandamus against the secretary of war to compel him to execute and deliver a contract under an advertisement for bids for dredging, which contract the relator claimed to have entered into with the secretary, so as to render it enforceable. The Supreme Court refused to consider any question as to whether the contract was to be regarded as complete or as to the authority of the secretary of war in the premises, because it appeared that at the time when the application for the mandamus was made the relator had voluntarily entered into a second contract to do the same work at a lower price and on different terms, and had already been paid on account thereof. "Even if the writ of mandamus could be so perverted as to make it serve the purposes of an ordinary suit," said Mr. Justice WHITE, "the relator is in no position to avail himself of such relief. He entered of his own accord into the second contract, and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this he is estopped from denying the validity of the contract. (Citing *Oregonian R. Co.* v. *Oregon R. & N. Co.*, 10 Sawyer, 464.) Nor does the fact that in making his second contract the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

As was said by the Supreme Court of Alabama in *Robinson* v. *Pebworth* (71 Ala. 240), estoppel in a case of this character "simply means that you shall not take the fruits of an illegal

transaction and afterwards set the transaction aside as illegal." In holding that the plaintiff here is precluded from attacking the plan and lease in question by reason of his sale of the privileges acquired by him thereunder as a stockholder in the Metropolitan Railway Company, we do not pass upon the legality of the scheme, either to condemn or approve it; we simply decide that, even assuming it to be as unlawful as he alleges, he is in no position to assail it.

This defense is available to the respondents notwithstanding the fact that the plaintiff did not sell his privileges until after the beginning of the suit. Matters which arise between the bill and plea may be pleaded in equity. (*Turner* v. *Robinson*, 1 Simons & Stuart, 3.) Under the old chancery system in this state there was no rule of equity pleading whereby a defendant was precluded from availing himself of matters arising between the filing of the bill and answer, by way of avoidance or defense. (*Lyon* v. *Brooks*, 2 Edw. Ch. 110.) Nor is there any such prohibition under the Code. (See *Beebe* v. *Dowd*, 22 Barb. 255, 259.) As was said by the late Mr. Justice HARDIN in *Mann* v. *City of Utica* (44 How. Pr. 334, 339): "It is a familiar rule in equity cases which permits courts to take into consideration subsequent events happening after the commencement of the action in equity and determining what relief shall be granted, especially where part of the relief asked for is an injunction from the court to restrain parties."

For the reasons which have been stated, and without considering or deciding the other questions discussed by counsel, we conclude that this judgment should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ., concur.

Judgment affirmed.

THERESA ROSSENBACH, Respondent, *v.* THE SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS, Appellant.

EVIDENCE — ERRONEOUS EXCLUSION ON CROSS-EXAMINATION OF QUESTIONS AFFECTING CREDIBILITY OF WITNESSES. Where in an action to enforce a fraternal insurance certificate, the principal issues litigated were, first, as to whether answers to questions in the application relating to the assured's use of intoxicating liquors were made by him or were written in without his knowledge or consent by the medical examiner; second, if made by the assured, whether they were true, and there is evidence that he was an habitual user of intoxicating liquors; that he had been convicted of public intoxication and had been confined in the penitentiary therefor; the refusal of the trial court to permit the plaintiff, who had sworn that the answers were made without the knowledge or consent of the assured and that she had never seen him intoxicated, to testify on cross-examination as to whether she had seen him in the penitentiary, constitutes reversible error; the exclusion, also, on cross-examination, of a question to plaintiff's son who had testified that he had known the assured all his life and had never seen him intoxicated, as to whether he had not talked with her about having a complaint made against the assured for intoxication, constitutes reversible error; both questions materially affected the credibility of the witnesses and should not have been excluded.

Rossenbach v. *Order of Foresters*, 98 App. Div. 634, reversed,

(Argued January 26, 1906; decided February 13, 1906.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 25, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, as far as material, are stated in the opinion.

O. P. Stockwell for appellant. Various exceptions to rulings on the admission and exclusion of evidence are well taken. (*Cary* v. *White*, 59 N. Y. 336; *Mead* v. *Shea*, 92 N. Y. 127; *Cruikshank* v. *Gordon*, 118 N. Y. 178; *Valton* v. *Nat. F. L. Ins. Co.*, 20 N. Y. 32; *People ex rel. Sears* v. *Tobey*, 153 N. Y. 399; *Hobart* v. *Hobart*, 62 N. Y. 80; *Foote* v. *Beecher*, 78 N. Y. 155; *Carroll* v. *Deimel*, 95 N. Y. 252,

256; *Holcomb* v. *Holcomb*, 95 N. Y. 316; *People* v. *Strait*, 154 N. Y. 165; *Cassady* v. *Uhlmann*, 170 N. Y. 522.)

George V. Fleckenstein for respondent.

CHASE, J. The plaintiff is the beneficiary named in a certificate or policy of insurance issued by the defendant to her brother, one of its members. On the 10th day of October, 1900, the assured made application for membership in the defendant and for fraternal insurance of $2,000. The application was accepted and the assured was initiated into the order November 22nd, 1900. The certificate of insurance is dated December 18th, 1900, and was delivered December 27th, 1900. Prior to the execution and delivery of the certificate and on the 12th day of December, 1900, the assured was committed to the State Hospital for the Insane at Rochester, and remained there until October 27th, 1901, when he died. The defendant refused to pay the amount of the certificate and the plaintiff brought this action thereon. The defendant by its answer alleged in substance that the assured, as a condition of being admitted into membership of the defendant, promised and agreed that if he should make any false representations in his application or written statement to the medical examiner or conceal any mental or physical infirmity or fail to disclose any material fact relating to himself, he would *ipso facto* forfeit all payments that he had made to the defendant and all benefits that he or his beneficiaries would otherwise be entitled to receive. The answer further alleged that the deceased, for the purpose of obtaining the certificate of insurance, did unlawfully, wrongfully and falsely represent and state to the medical examiner, among other things, that he did not drink wine, spirits or malt liquors and that he never had been intoxicated. The answer further alleged that the defendant relied upon said representations and believed them to be true, and that it was thereby induced to accept the deceased as a member of its order and issue to him said certificate; that in fact and in truth said statements were false and untrue and that they were made by the deceased with a pre-

conceived purpose of cheating and defrauding the defendant in obtaining admission into its order, and said certificate of insurance. The issues joined by the pleadings were tried before the court and a jury and the jury found in favor of the plaintiff, and the judgment entered thereon has been unanimously affirmed by the Appellate Division. The only questions remaining for our consideration are those arising upon the exceptions taken upon the trial.

In the assured's statement to the medical examiner, presented with his application for membership and insurance, the answer "No" is given to the following questions: "Do you drink wine?" "Do you drink spirits?" "Do you drink malt liquors?" "Have you been intoxicated within the past five years?" To the question, "When was the last occasion?" the answer "Never" is given, and to the further question, "What has been your habit in this respect during life?" the answer "Temperate" is given. The plaintiff asserted upon the trial that the assured did not make said answers to the questions relating to the use of intoxicating drinks, but that the medical examiner of the defendant placed the answers to said questions in said statement presented with his application for membership without asking him such questions and without the knowledge or consent of the assured. Many witnesses were sworn by the defendant to show that the assured was an habitual user of intoxicants and that he was repeatedly and almost continuously intoxicated for several years prior to his death, and that on two occasions, once in December, 1897, and again in October, 1899, he was arrested and convicted for public intoxication, and that on each occasion he served his sentence therefor in the penitentiary at Rochester. The plaintiff claimed on the trial that the defendant had not shown that the person confined in the penitentiary for public intoxication, although bearing the name of the assured, was in fact the assured. The plaintiff was sworn as a witness and testified that the deceased was employed at her husband's store for about *two years* prior to being taken to the hospital, and that he had his dinner at her house every

day during that time and that she saw him on each of those occasions. She further testified that she never saw him intoxicated, and that she never saw him drink intoxicating liquors, except one glass of beer several years prior to his death. On cross-examination she was asked the question: "Did you see Marzhauser (assured) in the penitentiary in this city at any time?" The question was objected to, without specifically stating the reasons therefor, and the objection was sustained and defendant excepted. Plaintiff's son was also sworn as a witness on behalf of the plaintiff, and he testified that he lived with the plaintiff and that he had known his uncle, the assured, all his life and that he never saw him intoxicated or drink intoxicating beverages. He was asked, on cross-examination: "Did you talk with your mother about having a complaint made against him for intoxication at that time?" — the time referred to was the year or two during which the assured had his dinners at the plaintiff's house. The plaintiff objected to this question upon the ground that it was immaterial, incompetent and irrelevant, and the objection was sustained and the defendant excepted.

The principal questions litigated on the trial and left to the jury for their determination were, *first*, whether the assured gave the answers appearing in said statement relating to his use of intoxicating liquors, as claimed by the defendant, or whether they were written therein by the defendant's medical examiner without the knowledge or consent of the assured, and, *second*, if the answers were in fact given by the assured as shown in his said statement, whether they were true. The question to the plaintiff was material upon the identity of the person confined in the penitentiary for public intoxication and as affecting the good faith and credibility of the plaintiff as a witness. If the plaintiff's son discussed with her the question as to the advisability of having the assured arrested for intoxication, it would materially affect the weight to be given to his testimony in contradiction of the testimony of the defendant relating to the assured's continued and excessive use of intoxicants. As these questions were clearly intended to elicit tes-

timony materially affecting one of the questions seriously litigated on the trial, the refusal to allow the questions to be answered cannot now be said to have been immaterial.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT and WERNER, JJ., concur; HISCOCK, J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM BALLIN, Respondent, *v.* DAVID P. SMITH, as Justice of the Peace of the Town of Montgomery, et al., Appellants.

1. WRIT OF PROHIBITION. A writ of prohibition will not be allowed to guard against a future apprehended error by an inferior tribunal, when, as matter of fact, such tribunal upon due objection may not commit such error and when, if it does commit it, the aggrieved party may be fully and adequately protected by ordinary process of appeal from, or review of, its action.

2. SAME—WHEN WILL NOT ISSUE TO RESTRAIN PROSECUTION OF ACTION IN JUSTICE'S COURT—IRREGULAR SERVICE OF SUMMONS—REMEDY. A justice of the peace has power to entertain an application to set aside the service of a summons; the defendant may specially appear and state the facts upon which he bases his claim of privilege without any waiver of his rights; if in a proper case the justice refuses to set aside the service the remedy is by an appeal. (Code Civ. Pro. §§ 3053, 3057.) The allowance, therefore, in such a case of a writ of prohibition restraining the further prosecution of the action constitutes reversible error, and an order granting the writ must be reversed.

People ex rel. Ballin v. *Smith*, 106 App. Div. 613, reversed.

(Argued January 8, 1906; decided February 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 23, 1905, which affirmed an order of Special Term granting a motion for a writ of prohibition.

The facts, so far as material, are stated in the opinion.

A. S. Embler for appellants. The writ of prohibition should not have issued in this case. Relator's proper remedy

was to have appeared specially before the justice on the return day of the summons, and object to the jurisdiction of the court, and move to dismiss the action. If relator was aggrieved by the decision thereon, he had ample redress by appeal. (Spelling on Injunctions [2d ed.], §§ 1716, 1717, 1725, 1729; *People ex rel.* v. *Marine Court*, 36 Barb. 341; Throop on Pub. Officers, § 836; High on Ex. Leg. Rem. §§ 765, 773; *People ex rel.* v. *Westbrook*, 89 N. Y. 154; Fiero Spec. Pro. 281, 283; *People ex rel.* v. *Clute*, 42 How. Pr. 157; *People ex rel.* v. *Nichols*, 79 N. Y. 582; *Ex parte Braudlacht*, 2 Hill, 367; *People ex rel. James* v. *Surrogate*, 36 Hun, 218; *People ex rel.* v. *Wood*, 21 App. Div. 247; *People ex rel.* v. *Supervisors*, 31 How. Pr. 237; *People ex rel.* v. *Sherman*, 66 App. Div. 234; *People ex rel.* v. *Fitzgerald*, 73 App. Div. 344; *Coker* v. *Superior Court*, 58 Cal. 178.)

William C. Rosenberg for respondent. It was not necessary for the relator to appear specially before the justice and object to the jurisdiction of the court. (*People ex rel. Hess* v. *Inman*, 74 Hun, 130.)

HISCOCK, J. The writ of prohibition granted herein in effect restrained the prosecution of a civil action brought before the appellant Smith as a justice of the peace by the appellant Williams as plaintiff against the relator as defendant. We think that it was error to grant this writ, and that the order appealed from must be reversed.

The facts upon which the writ was based are briefly as follows:

The defendant justice of the peace held office in the town of Montgomery, Orange county, while the relator resided in the county of New York. The latter was brought into the town of Montgomery under subpœna as a witness in supplementary proceedings. Just as his examination was completed he was served with a summons in the action in Justice's Court of which prosecution has been prohibited. Two days before the return day fixed in the summons he secured an alternative

writ of prohibition, staying further proceedings in said action, which was subsequently made absolute. While we do not regard it as a matter of any special consequence, it appears that the justice who issued the summons was the referee before whom the relator had been examined as a witness.

It is substantially conceded, as it must be, that advantage could not be taken of relator's presence in the town of Montgomery under the circumstances to secure service of the summons upon him. Strictly speaking, we doubt whether these circumstances generally and broadly, as claimed, deprived the justice of the peace of jurisdiction in the suit. We think rather that relator's character as a witness gave him a privilege or exemption from service which he might successfully urge as a reason why such jurisdiction could not be exercised against him. Whichever view is taken, however, there is no doubt that he could successfully present the facts disclosed as a reason why the action should not be prosecuted against him. (*Parker* v. *Marco*, 136 N. Y. 585.)

The only question is whether his rights should be protected in the manner adopted by him, or by some other course, and in our judgment the answer to this question must be in favor of the latter alternative.

The writ of prohibition is an extraordinary remedy and should be issued only in cases of unusual necessity. Without attempting generally to define the cases wherein it may or may not be granted, it is certainly well within the authorities and principles of a wise judicial policy to state that it will not be allowed in a case like this to guard against a future apprehended error by an inferior tribunal, when, as matter of fact, such tribunal upon due objection may not commit such error, and when if it does commit it the aggrieved party may be fully and adequately protected by ordinary process of appeal from or review of its action. We shall sufficiently indicate the reasons for reversing relator's method of procedure in this instance if we point out how he might have asserted his rights before the justice and by appeal might have corrected the latter's action if he erroneously overruled those rights.

Relator's privilege from service of a summons was one to be asserted upon an application to get rid of the service rather than by any plea or defense in connection with the merits of the action. (*Matthews* v. *Tufts*, 87 N. Y. 568; *Waring* v. *McKinley*, 62 Barb. 612, 621.)

While a justice of the peace is an officer of limited jurisdiction and while that authority by express terms may not be conferred upon him, we have no doubt that the defendant justice had the power upon the return of the summons to entertain an application by relator to set aside its service upon the grounds already stated. The right upon objection to ascertain whether a summons has properly been served so as to confer jurisdiction is so necessarily incidental to the discharge of his duties by a justice that no violation of any principle of law will be committed by regarding him as invested therewith. This being so it would have been the proper, natural and adequate course for relator, upon the return day, to have specially appeared before the justice and upon affidavits setting forth the facts upon which he based his claim of privilege to have asked that the service of the summons be set aside and to have objected to further proceedings in and with said action. Such special appearance would not have worked any waiver of his rights and it would have acquainted the justice in a lawful and official way with the fact that relator not only had a privilege but insisted upon and did not waive it. (*Weston* v. *Citizens' Nat. Bank*, 64 App. Div. 145; *Waring* v. *McKinley*, *supra*; *Burbanks Hardware Co.* v. *Hinkel*, 76 App. Div. 183; *Boynton* v. *Keeseville E. L. & P. Co.*, 5 Misc. Rep. 118; affirmed, without opinion, 78 Hun, 609; *Willins* v. *Wheeler*, 28 Barb. 669.)

If, upon proper proof of the facts and due objection, the justice persisted in continuing the action, the proceedings would have been part of the return upon appeal and subject to review and any proper correction. (Code Civ. Pro. § 3053, and cases last cited.)

In addition to this the Code (§ 3057) provides for relief upon appeal from Justice's Court against any error of fact in

the proceeding not affecting the merits of the action, and not within the knowledge of the justice, upon affidavits or examination of witnesses in the appellate court. (*Sperry* v. *Reynolds*, 5 Lansing, 407; reversed upon other grounds, 65 N. Y. 179; *Fitch* v. *Devlin*, 15 Barb. 47; *Larocque* v. *Harvey*, 57 Hun, 366.)

So that a defendant against whom jurisdiction in Justice's Court has been sought by prohibited, irregular or incomplete service of a summons, and who for any sufficient reason has not presented his objections to the justice upon the purported return day of the summons, may still have protection and relief by appeal and presentation of the facts in the appellate court.

Under all of the circumstances it seems very clear that relator might have asserted his privilege before the justice, and that by the ordinary process of appeal from any judgment rendered might have secured full relief from any error committed in prejudice of his rights.

As we have stated at the commencement the demonstration of this affords a clear and sufficient reason why the relator should not be allowed to prosecute the unusual and more burdensome form of remedy which he has attempted.

The orders of the Appellate Division and Special Term should be reversed and the application denied, with costs in all the courts.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN and WERNER, JJ., concur; WILLARD BARTLETT, J., not sitting.

Orders reversed, etc.

CHARLES F. SHARP, as Administrator of the Estate of GEORGE SHARP, Deceased, Appellant, *v.* ERIE RAILROAD COMPANY, Respondent.

1. NEGLIGENCE — UNDISPUTED FACTS DO NOT NECESSARILY CREATE QUESTION OF LAW. In actions for personal injuries arising from negligence and in other actions sounding in tort, although the facts are undisputed, the question does not necessarily become one of law.

2. RAILROADS — NO IMMUNITY FROM LIABILITY FOR ACTS OF SERVANT BECAUSE HE IS ALSO A PUBLIC OFFICER — QUESTION FOR THE JURY. A railroad company which employs a servant to protect its tracks and

property and look after crimes committed against it and its right of way, acquires no immunity for the acts of such servant, within the scope of his employment, from the fact that the servant happens to be a constable, policeman or other public officer. It is not beyond the province of a jury in such a case to find that the official acts of the employee are to be used for the benefit of the defendant and in protection of its interests or property; and hence the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all; if he acts maliciously or in pursuit of some purpose of his own, the defendant is not bound by his conduct, but if, while acting within the general scope of his employment, he simply disregards his master's orders or exceeds his powers, the master will be responsible for his conduct.

3. SAME. Where a boy, who had been stealing a ride upon a freight train of a railroad company and had jumped from the train, was pursued by a detective employed by the company to keep tramps and trespassers from its trains and yards, and was followed by him out of the yard and across land adjacent thereto to a point about one hundred feet distant therefrom where he was killed by a shot fired by the detective, who was also outside the yard and about fifty feet behind him, it is for the jury to determine, upon the trial of an action against the company to recover damages for the death of the boy, whether the detective acted within the scope of his employment, or whether, being a public officer, he acted in that capacity alone.

4. WITNESS — CREDIBILITY OF, A QUESTION OF FACT. The fact that, after testifying for the plaintiff as to the circumstances resulting in the shooting, the detective on cross-examination testified to facts in the nature of an excuse for his own conduct, which facts were undisputed, does not authorize the court to take the case from the jury, since the question of the credibility of the witness still remained for its determination.

Sharp v. *Erie R. R. Co.*, 90 App. Div. 502, reversed.

(Argued January 25, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 29, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

David C. Robinson and *Frank C. Ogden* for appellant. The nonsuit was error, and there are no grounds on which it can be sustained. (*Rounds* v. *D., L. & W. R. R. Co.*, 64

N. Y. 129; *Lynch* v. *Met. El. R. R. Co.*, 90 N. Y. 77; *Cohen* v. *D. D., E. B. & B. R. R. Co.*, 69 N. Y. 170; *Peck* v. *N. Y. C. & H. R. R. R. Co.*, 70 N. Y. 587; *Hoffman* v. *N. Y. C. & H. R. R. R. Co.*, 87 N. Y. 25; *Kastner* v. *L. I. R. R. Co.*, 76 App. Div. 323.) Plaintiff should have been allowed to go to the jury on the testimony of Wheeler, who was an interested witness. His credibility was for the jury. (*Becker* v. *Koch*, 104 N. Y. 394; *Manhattan Co.* v. *Phillips*, 109 N. Y. 383; *Cross* v. *Cross*, 108 N. Y. 628; *Wohlfahrt* v. *Beckert*, 92 N. Y. 490; *Govin* v. *De Miranda*, 140 N. Y. 666; *Dean* v. *M. E. R. Co.*, 119 N. Y. 540; *Connelly* v. *C. V. R. R. Co.*, 4 App. Div. 221; *Hoes* v. *T. A. R. R. Co.* 5 App. Div. 151; *Kennedy* v. *McAllaster*, 31 App. Div. 458; *Elwood* v. *W. U. T. Co.*, 45 N. Y. 549; *Kavanagh* v. *Wilson*, 70 N. Y. 177; *Gildersleeve* v. *Landon*, 73 N. Y. 609.)

Frederick Collin for respondent. The nonsuit was proper. (*Mott* v. *C. I. Co.*, 73 N. Y. 543; *Rounds* v. *D., L. & W. R. R. Co.*, 64 N. Y. 129; *Girvin* v. *N. Y. C. & H. R. R. R. Co.*, 166 N. Y. 289; 2 Wood's Railway Law, 1212, 1213; *Gilliam* v. *Railroad Co.*, 70 Ala. 268; *Tolchester Beach Imp. Co.* v. *Steinmeier*, 72 Md. 313, 319; *Dolan* v. *Hubinger*, 109 Iowa, 408; *Central Ry. Co.* v. *Peacock*, 59 Md. 257; *McGilray* v. *Railway*, 164 Mass. 122; *Palmer* v. *Weston-Salem Ry. & Electric Co.*, 131 N. C. 250; *Southern Pac. Co.* v. *Kennedy*, 29 S. W. Rep. 394.) Plaintiff's contention that he should have been allowed to go to the jury upon the testimony of Wheeler cannot be sustained. (*Becker* v. *Koch*, 114 N. Y. 394; *Cross* v. *Cross*, 108 N. Y. 628; *Manhattan Co.* v. *Phillips*, 109 N. Y. 383; *Ray* v. *E. L. Assur. Society*, 16 App. Div. 194; *Hull* v. *Littauer*, 162 N. Y. 569; *Johnson* v. *N. Y. C. & H. R. R. R. Co.*, 173 N. Y. 79; *Wohlfahrt* v. *Beckert*, 92 N. Y. 490.)

O'BRIEN, J. The plaintiff's intestate, a boy about seventeen years of age, was shot and killed on the 16th of May, 1901, by a man named Wheeler, at Salamanca. The boy, with

one or two companions, got upon one of defendant's freight cars at Elmira for the purpose of stealing a ride. They were running away from their homes and their destination was Youngstown, Ohio. When the train arrived at Salamanca, some sixty miles west, it appears that three men shouted to them that there were detectives in the yard and they proceeded to get off as quickly as possible. They jumped from the moving train and were pursued by Wheeler along the railroad track for some distance to the west, when the boy turned at right angles and passed to the adjacent land through an open gate. The pursuit was continued by Wheeler for about fifty feet on the adjoining land and when the boy, being ahead of him, was about one hundred feet from the railroad premises Wheeler drew a pistol and fired at him, the ball entering the back of his head, producing death.

The question in this case is whether the defendant can be held responsible for the act of Wheeler in killing the boy. It is claimed that Wheeler acted in a dual capacity; that while he was the servant of the defendant for certain purposes he was also a public officer, and that he killed the boy while acting in the capacity of such officer and not as the servant of the defendant. It is important to know at this stage of the discussion just what Wheeler's relations to the defendant were. There does not seem to be any dispute in regard to the scope of his employment. He was paid fifty dollars a month by the defendant and his duties were to protect the company's interests on the right of way; to keep tramps from trains and look after robberies that might occur at stations and on freight cars in the yards and on the tracks and in the station and look after persons in an intoxicated condition on the company's property, and generally to look after crimes committed against the railroad company on the right of way. It was part of his duty to drive off and keep off trespassers from the company's property. His duty was not limited to keeping trespassers off the trains where it was to the company's interest to keep them out of the yard. That was largely committed to his discretion.

It will be observed that there is no conflict in the testimony nor any dispute about the facts and it is argued by the learned counsel for the defendant that in such cases the question becomes one of law for the court and there is nothing for the jury to pass upon. That was the view taken by the learned courts below. The plaintiff was nonsuited and the Appellate Division affirmed the judgment. It is argued that the moment Wheeler passed beyond the boundaries of the defendant's premises onto the adjoining lot where the deceased was killed he was no longer acting as the defendant's servant but was pursuing and seeking to arrest the boy who had committed or was engaged in the commission of a crime. It will be noted that the pursuit commenced when the deceased jumped from the car and was continuous until the shooting occurred. So the question is whether, at the time that Wheeler fired the fatal shot, he was acting as the defendant's servant or as a public officer, and further, whether that question was one of law for the court or of fact for the jury.

In actions for personal injuries arising from negligence, and in other actions sounding in tort, it is far from correct to assert that when the facts are undisputed the question becomes one of law. Whether the undisputed facts impute negligence is for the jury, when the circumstances are such that men of ordinary prudence and discretion might differ as to the character of the acts under the circumstances of the case, or whether the inferences to be drawn from or the significance to be attached to the testimony are doubtful. (1 Thomas on Negligence, p. 673.) A recent author who has written much on the law of negligence states the rule in these words: "It is obviously a question of fact for the determination of a jury whether, at the time of the particular act or omission by the servant which caused the injury the plaintiff's servant was acting within the scope of his employment or acting outside of it to effect some purpose of his own. Upon such a question the verdict of a jury will be conclusive. * * * Whether the person whose immediate negligence or misconduct caused the particular injury was acting at the time as the servant of

the person sought to be charged frequently depends on such a variety of facts that it falls outside of any definite rule, and for that reason becomes, under proper instructions, a question of fact for the jury." (1 Thompson on Negligence, §§ 615, 616.) The circumstances of this case, it seems to me, presented a question of the same general character. Did Wheeler, at the moment that he fired the fatal shot, put off his character as a servant of the defendant and put on another and different character, namely, the powers and duties of a public officer? Does the fact that he crossed the boundary line of the defendant's premises in pursuit of the boy make the question one of law? If it be a question of law the principle would be the same whether he had passed the boundary line by the distance of two feet instead of fifty. It is obvious that there is no rule or principle of law to determine such a question, and hence it belonged to the jury.

It has been frequently decided by this court that cases almost identical in their facts must be determined by the jury when the testimony is of the same character as that in the case at bar. (*Rounds* v. *D., L. & W. R. R. Co.*, 64 N. Y. 129; *Lynch* v. *Met. El. R. R. Co.*, 90 N. Y. 77; *Cohen* v. *Dry Dock, etc., R. R. Co.*, 69 N. Y. 170; *Peck* v. *N. Y. C. & H. R. R. R. Co.*, 70 N. Y. 587; *Hoffman* v. *N. Y. C. & H. R. R. R. Co.*, 87 N. Y. 25.)

These cases and other cases on the same subject were reviewed and approved in a very recent case in this court, which is almost identical in its facts with the case at bar. (*Magar* v. *Hammond*, 183 N. Y. 387.) It was there held that the defendant would be liable for the act of Wheeler if he was engaged within the general scope of his employment, and whether he was so engaged or was seeking to effect some purpose of his own was a question of fact for the jury.

A railroad company employing a servant who happens to be a public officer acquires no immunity from such employment. Constables and policemen are often employed by corporations in the same capacity as Wheeler was. It is not beyond the

province of a jury in such a case to find that the official acts of the employee are to be used for the benefit of the defendant and in protection of its interests or property. And, hence, in such a case the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all. If he acts maliciously or in pursuit of some purpose of his own, the defendant is not bound by his conduct, but if, while acting within the general scope of his employment, he simply disregards his master's orders or exceeds his powers, the master will be responsible for his conduct.

There was no proof in this case that Wheeler was a public officer, except his own statement given upon the examination of the defendant's counsel. It seems that the plaintiff's counsel called him as a witness to prove the facts resulting in the shooting of the boy, and upon the defendant's cross-examination he testified to his official character without producing any written or record evidence of the fact. The rule in such cases seems to be that where one of the parties to an action calls his opponent as a witness and proves by him facts tending to sustain his case, and such witness in his own behalf afterwards gives an explanation of the circumstances which, if true, repels the idea of liability on the part of the defendant, and though such explanation is not disputed by other evidence, this does not authorize the court to take the case from the jury; it is for them to determine what degree of faith is to be given to the explanatory testimony. Wheeler was undoubtedly an interested witness. He testified to facts necessary to the plaintiff's case and then testified to facts in the nature of an excuse for his own conduct, and although the excuse was not affected by any other evidence, still his credibility was for the jury. (*Becker* v. *Koch*, 104 N. Y. 394; *Manhattan Co.* v. *Phillips*, 109 N. Y. 383; *Cross* v. *Cross*, 108 N. Y. 628.)

It follows that it was for the jury to determine whether Wheeler acted within the scope of his employment, or whether, being a public officer, he acted in that capacity

alone. For these reason I think the judgment should be reversed and a new trial granted, costs to abide the event.

CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER and HISCOCK, JJ., concur. GRAY, J., dissents on the ground that as the plaintiff had shown Wheeler to be a local police officer, constable and deputy sheriff, and that the assault upon the boy was not committed upon the defendant's premises, his act was necessarily that of an officer of the law. Hence the nonsuit was right. Not sitting, CHASE, J.

Judgment reversed, etc.

FRANK DONLEY, Respondent, *v.* GLENS FALLS INSURANCE COMPANY, Appellant.

1. FIRE INSURANCE — BREACH OF WARRANTY AS TO ONE SUBJECT OF INSURANCE DOES NOT AFFECT POLICY AS TO THE OTHER SUBJECTS. Where by the same policy of fire insurance, different classes of property, each separately valued, are insured for distinct amounts, even if the premium for the aggregate amount is paid in gross, the contract is severable and a breach of warranty as to one subject of insurance only does not affect the policy as to the others, unless it clearly appears that such was the intention.

2. WHEN WARRANTIES IN APPLICATION AND POLICY HAVE SAME EFFECT. Where the application for insurance provides that the statements contained therein are made "a special warranty, the same as if written on the face of the policy," an intention is indicated that they should have the same effect only.

3. ERRONEOUS EXCLUSION OF EVIDENCE TENDING TO SHOW BREACH OF EXPRESS WARRANTY. A statement in such an application that the insured has no reason to fear incendiarism constitutes an express warranty to that effect, even if that fact were not material to the risk, and if untrue, renders the policy void. Evidence, therefore, in an action upon the policy, that several fires had occurred on farms belonging to the wife of the insured and managed by him, that he had stated previous to making the application that the fires were of incendiary origin and that some of them were set by his enemies because of a grudge against him, is competent and material as tending to show the falsity of such statement, and its exclusion constitutes reversible error.

Donley v. *Glens Falls Ins. Co.*, 100 App. Div. 69, reversed.

(Argued February 7, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 13, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

This action was brought upon a standard policy of fire insurance, issued by the defendant to the plaintiff on the 8th of September, 1903, in which the amount of insurance and the subject of the risk were described as follows: "$700 on two story, shingled roof, frame building, with additions, foundations and all permanent fixtures while occupied as a private family residence; $450 on barn No. 1 on diagram, including sheds and additions attached; $1,000 on farm produce and feed, while therein and in stacks within 100 feet; $100 on farming tools and utensils, including mower and reaper, while in said barns; $100 on wagons, carriages, sleighs, harnesses, with horse and carriage equipment, while in said barns; $200 on pine shingles and lumber in said barn; all situated on the farm owned by the insured while occupied by tenant in the township of Italy, county of Yates and state of New York. For a more particular description reference is had to the application and survey of the assured, No. 1213, on file with this company, which is a warranty, and is made a part of this contract."

The policy provided that "this entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. * * * This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership. * * * If an application, survey, plan or description of property be referred to in this policy it shall be part of this contract and a warranty by the insured."

The written application signed by the plaintiff contained the following questions and answers:

"35. Title. Have you fee simple title? Yes.

"37. Is title or possession in litigation or dispute? No.

"38. Incumbrance. Is there any mortgage or other lien on any of this property? No.

"51. Have you any reason to fear incendiarism? No.

"52. Have you ever suffered loss by fire? No. When?

"53. State fully the origin, Company insured in, etc."

The following is the last sentence in the application: "And the said applicant hereby warrants, covenants and agrees to and with said company that the foregoing is a full, just and true exposition of all the facts and circumstances, conditions, situation and values of and title to the property to be insured and is offered as a basis of insurance requested and is made a special warranty, the same as if written on the face of the policy, and the statement is offered and received and to be taken and to have the effect of a warranty and not a representation."

On the 13th of October, 1903, barn No. 1 and the personal property contained therein were wholly destroyed by fire.

The complaint was in the usual form, and the defendant pleaded, among other defenses, a breach of said warranty relating to title, unconditional and sole ownership, incumbrances, reason to fear incendiarism, etc. It was conclusively proved upon the trial that at the date of the policy, as well as at the time of the fire, the plaintiff was not the unconditional and sole owner of the land upon which the buildings insured were situated, for he owned only an undivided sixth interest therein, subject to the debts of a prior owner, and an action was pending with a *lis pendens* duly filed November 8th, 1901, to collect such debts by a sale of the land. It also appeared that the premises were subject to the lien of a judgment recovered against the plaintiff and duly docketed in the clerk's office of Yates county on the 5th of June, 1894.

At the close of all the evidence the complaint was dismissed as to the insurance of $450 on the barn, upon the ground that

there was a breach of warranty as to title and incumbrances. The trial judge, however, held that this breach did not affect the contract as to the personal property, and a verdict was directed in favor of the plaintiff for the value thereof, which was left to the jury to determine. The judgment entered accordingly was affirmed by the Appellate Division, two of the justices dissenting.

Hiram R. Wood for appellant. The complaint should have been dismissed as to the entire policy because of the undisputed breaches of the warranties contained in the written application. (*Smith* v. *E. Ins. Co.*, 25 Barb. 497; *Higbie* v. *G. Ins. Co.*, 66 Barb. 462; *Ripley* v. *Æ. Ins. Co.*, 30 N. Y. 136; *Rohrbach* v. *G. Ins. Co.*, 62 N. Y. 47; *Alexander* v. *G. Ins. Co.*, 66 N. Y. 464; *Graham* v. *F. Ins. Co.*, 87 N. Y. 69; *Smith* v. *A. Ins. Co.*, 118 N. Y. 518; *Clements* v. *C. Ins. Co.*, 29 App. Div. 131; *Wilson* v. *H. C. M. Ins. Co.*, 6 N. Y. 53; *Chaffee* v. *C. C. M. Ins. Co.*, 18 N. Y. 376.) The evidence offered by the defendant with reference to previous fires, that they were of incendiary origin, as stated by the plaintiff, and that as to the last fire the plaintiff stated that the buildings were set on fire by enemies of his who had a grudge against him, was improperly excluded. (*Rohrbach* v. *G. Ins. Co.*, 62 N. Y. 47.)

Calvin J. Huson for respondent. The contract is severable and the plaintiff is entitled to recover his loss on the personal property, even though there was such a breach of warranty as to the insurance upon the buildings as precludes a recovery for loss upon the dwelling house. (*Kings* v. *T. C. P. R. Assn.*, 35 App. Div. 58; *Knowles* v. *A. Ins. Co.*, 66 Hun, 220; *Schuster* v. *D. C. Ins. Co.*, 102 N. Y. 260; *Smith* v. *H. Ins. Co.*, 47 Hun, 30; *Mott* v. *C. Ins. Co.*, 69 Hun, 501; *Pratt* v. *D. H. M. F. Ins. Co.*, 130 N. Y. 206; *Merrill* v. *A. Ins. Co.*, 73 N. Y. 452; *Tompkins* v. *H. Ins. Co.*, 22 App. Div. 380; *Adler* v. *G. Ins. Co.*, 17 Misc. Rep. 347; *A. A. G. S. Co.* v. *G. F. Ins. Co.*, 1 Misc. Rep. 114.)

VANN, J. Whatever our views might be if the question were new, we regard it as settled that where, by the same policy, different classes of property, each separately valued, are insured for distinct amounts, even if the premium for the aggregate amount is paid in gross, the contract is severable and a breach of warranty as to one subject of insurance only does not affect the policy as to the others, unless it clearly appears that such was the intention. (*Knowles* v. *American Ins. Co.*, 66 Hun, 220; 142 N. Y. 641; *Pratt* v. *Dwelling House Mutual Fire Ins. Co.*, 130 N. Y. 206, 221; *Schuster* v. *Dutchess Co. Ins. Co.*, 102 N. Y. 260; *Herrman* v. *Adriatic Fire Ins. Co.*, 85 N. Y. 162; *Merrill* v. *Agricultural Ins. Co.*, 73 N. Y. 452; *Deidericks* v. *Commercial Ins. Co.*, 10 Johns. 233; *Trench* v. *Chenango Co. Mutual Ins. Co.*, 7 Hill, 122.) Some early cases holding the contrary doctrine are no longer followed in this state, and *Smith* v. *Agricultural Ins. Co.* (118 N. Y. 518), relied upon by the defendant, was distinguished in the *Knowles Case* (*supra*), because the contract provided that the "entire policy and *every part thereof*" should be void if the property insured *or any part thereof* was incumbered. In the *Knowles* case, as in the case before us, the provision was simply that the entire policy should be void in case of a breach, and the recent cases hold that this means the entire policy so far as it relates to the subject of insurance affected by the breach, because a severable policy is equivalent to as many policies as there are classes of property separately valued. In other words, the breach avoids the entire policy relating to the risk to which the warranty applies.

The claim of the defendant that the warranties in the application have a different effect from those in the body of the policy is not sustained by the authorities, for in the *Pratt Case* (*supra*), as the appeal book shows, the application containing the warranty broken was referred to in the policy and made a part thereof, yet a recovery, although denied as to the building, was allowed as to the personal property. Moreover, the application now before us provides that the war-

ranties therein shall be "the same as if written on the face of the policy," which indicates an intention that they should have the same effect only.

Upon the trial evidence was given by the defendant tending to show that for more than twenty years the plaintiff had resided on a farm belonging to his wife, situated about one mile from the farm in question. He worked it for his wife while they lived thereon and after moving to a neighboring village he managed it for her, making the contracts with tenants who worked it on shares and settling with them. The defendant called several witnesses to show that, in 1892, two stacks of clover on the farm of the plaintiff's wife while so worked, managed or controlled by him, were destroyed by fire; that in 1896 a barn and its contents on the same farm were burned; that in January, 1899, the house upon that farm and, in November of the same year, the barns thereon with the contents were destroyed in the same way. All this property was insured when it was thus burned.

The defendant sought to show by these witnesses that before the policy in question was issued the plaintiff had stated to them that these fires were of incendiary origin, and that some of them were set by enemies of his because of a grudge they had against him on account of certain transactions. The evidence was excluded on the objection of the plaintiff that it was immaterial and incompetent.

The exception to these rulings raised reversible error. As the plaintiff had stated in his application that he had no reason to fear incendiary fires, the defendant had the right to show his declarations that these numerous fires had been caused by his enemies on account of their feeling toward him. While the fires occurred on his wife's premises and destroyed her property only, still if he thought when he made the application that they were kindled by his enemies because they had a grudge against him, it bore on the truth of his statement that he had no reason to "fear incendiarism." Although two of the fires were somewhat remote in time, two of them were comparatively recent and they all occurred on his wife's farm which

he controlled and which was near his own. His admission that they were owing to the crimes of incendiaries, committed out of malice toward him, would have authorized the jury to find a breach of the warranty to the effect that he had no reason to fear a repetition of those crimes with reference to the property upon which he sought insurance. The moral hazard, to which insurers properly give much heed, was materially increased by the danger that his enemies would destroy his property as they had previously destroyed that of his wife and for the same reason. Even if the fact covered by the warranty had not been material to the risk, as he warranted it to be true, the policy was void unless it was true. This warranty applied with equal force to every part of the contract, regardless of the separate valuations, for it necessarily affected real and personal property in the same way. He agreed that his answer to a certain question should be a warranty and he was bound by his agreement, even if the fact called for did not increase the hazard. A representation is collateral to the contract and to be effective must be material to the risk, but a warranty, whether material or not, being part of the contract, has the force of a condition precedent and, unless it is true, the insurer is not bound by his promise. As the plaintiff expressly warranted that his answer as to fear of incendiarism was true, while the evidence excluded would have tended to show that it was not true, the defendant was prevented from establishing a defense duly set forth in the answer. This error requires a reversal and a new trial.

The judgment should be reversed and a new trial granted, costs to abide the event.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment reversed, etc.

EUGENE E. HINKLE et al., Respondents, *v.* JACOB A. ZIMMERMAN, Appellant.

1. ARBITRATION — APPLICATION OF PARTICULAR CODE PROVISIONS (§§ 2365–2386) TO COMMON-LAW ARBITRATIONS. While chapter 17, title 8, of the Code of Civil Procedure does not affect common-law arbitrations, "except as otherwise especially prescribed" (§ 2386), this clause indicates that there are provisions therein that were intended to include and apply to such arbitrations.

2. COMMON-LAW ARBITRATION — WAIVER OF OATH MUST BE IN WRITING — CODE CIV. PRO. § 2369. Section 2369 of the Code of Civil Procedure, providing that "arbitrators selected either as prescribed in this title *or otherwise* must be sworn, * * * unless the oath is waived by the written consent of the parties to the submission or their attorneys," applies to arbitrators selected under a common-law arbitration; they must be sworn, and where a waiver is relied upon to defeat the award it must be in writing the same as in statutory arbitrations.

Hinkle v. *Zimmerman*, 102 App. Div. 616, affirmed.

(Argued February 9, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 7, 1905, which affirmed a judgment of Special Term setting aside an award in favor of defendant on the submission of a controversy to arbitration.

The facts, so far as material, are stated in the opinion.

Benjamin G. Paskus and *Gibson Putzel* for appellant. The statutory oath required by the provisions of section 2369 of the Code may be waived by acts of the parties as well as by written consent. (*Day* v. *Hammond*, 57 N. Y. 479; *Howard* v. *Sexton*, 4 N. Y. 157; *Matter of N. Y., W. S. & B. R. R. Co.*, 35 Hun, 478; *Wassum* v. *Feeney*, 121 Mass. 94; *Johns* v. *Hodges*, 45 AM. Rep. 722; *Cutter* v. *Cutter*, 16 J. & S. 470.)

James W. McElhinney for respondents. Under section 2369 of the Code the arbitrators and witnesses must be sworn, even when the submission to arbitration is of such an informal character as to be held a "common-law" submission. (*N. Y.*

L. & W. W. Co. v. *Schneider*, 119 N. Y. 475; *Flannery* v. *Sahagian*, 134 N. Y. 85.) A waiver must be evidenced by the written consent of the parties or their attorneys. (*Flannery* v. *Sahagian*, 134 N. Y. 85; Code Civ. Pro. § 2369.)

HAIGHT, J. This action was brought to set aside an award made by arbitrators and an umpire, under a submission of a controversy between the parties hereto, upon the ground that neither the arbitrators nor the umpire took the required statutory oath before entering upon their duties.

The trial court found as facts that the plaintiffs did not know that neither the arbitrators nor umpire had taken the required statutory oath until after the rendition of the said umpire's decision; and that the taking of the required oaths was not waived by the written or verbal consent of the parties or their attorneys, and as conclusion of law that the award rendered was null and void and should be set aside. The appellant contends that the award made was upon a common-law arbitration and that under the evidence the trial court should have found that the oaths of the arbitrators and umpire were waived by the conduct of the parties. We think that the evidence justifies the finding of the trial court, but inasmuch as a question of law is raised with reference to the construction of the Code of Civil Procedure upon the subject we have concluded to determine that question.

It may be conceded that the provisions of chapter seventeen, title eight, of the Code of Civil Procedure generally have reference to statutory arbitrations. The concluding clause of section 2386 is that "except as otherwise expressly prescribed therein, this title does not affect a submission made otherwise than as prescribed therein, or any proceedings taken pursuant to such a submission, or any instrument collateral thereto." As we understand this provision, it was not intended to affect common-law arbitrations "except as otherwise expressly prescribed." It is thus apparent from the exception contained in the provision that there are provisions to be found in the title that were intended to include and apply to common-

law arbitrations. Such an exception is to be found in section 2383, which provides that "A submission to arbitration, made either as prescribed in this title *or otherwise*, cannot be revoked," etc. This provision was considered in the case of *N. Y. L. & W. W. Co.* v. *Schnieder* (119 N. Y. 475, 478), and it was held that the words "or otherwise" necessarily included common-law submissions to arbitration. We also are of the opinion that another exception is to be found in the provisions of section 2369, which provides that "Before hearing any testimony, arbitrators selected either as prescribed in this title *or otherwise* must be sworn, by an officer designated in section 842 of this act, faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding; unless the oath is waived by the written consent of the parties to the submission or their attorneys." The words "or otherwise" herein referred to indicate a legislative intent to extend the requirement, that an arbitrator should be sworn, not only to those selected under the provisions of the title, but as well to those selected under a common-law arbitration. This being so, it follows that they must be sworn unless the oath is waived by the written consent of the parties to the submission or their attorneys. The provision with reference to the waiving of the oath was inserted in the revision of the Code in 1880. In considering it in the case of *Flannery* v. *Sahagian* (134 N. Y. 85, 90), we said: "It appears to us that the clause referred to in section 2369 of the Code was intended to provide a rule of evidence from which the question of waiver may be determined. The evidence required to establish such waiver is the written consent of the parties or their attorneys. This requirement is not harsh or unjust. Parties who wish to submit their controversies to arbitration under the provisions of the Code, will find it no more difficult to comply with the provisions of this section than that of any other section. We regard the added provisions as wise and beneficial. It will tend to relieve the courts and suitors of the numerous motions which were formerly made to set aside reports by reason of irregulari-

ties similar to the one under consideration. Under the former practice, the question as to whether there was or was not a waiver was usually controverted, and had to be determined upon affidavits read upon the motion. This is now disposed of by the provision of the Code, which requires such waiver to be established by the written consent of the parties or their attorneys." In that case we also considered that of *Cutter* v. *Cutter* (16 J. & S. 470) which had reference to a common-law arbitration and we, therefore, held that it was distinguishable upon that ground. But we have now reached the conclusion that we should go farther and expressly overrule the determination in that case so far as this question is concerned, and that the same rule with reference to evidence required in determining whether or not there was a waiver of the oaths of the arbitrators should apply to common-law arbitrations as well as to those provided by the statute. The reasons for it are apparent; the parties in this case have engaged in a long and expensive litigation through the courts, which under the provisions of the section referred to would have been obviated had the question been determined by the written stipulation of the parties or their attorneys.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment affirmed, etc.

JAMES S. THOMPSON et al., Respondents, *v.* HENRY WITTKOP, as Treasurer of ST. ANDREW'S CHURCH SOCIETY, Appellant, Impleaded with Another.

PLEADING — DENIAL SHOULD BE CLEAR AND SPECIFIC — CODE CIV. PRO. § 500. A denial contained in an answer of all the allegations contained in specified folios of a complaint, except as hereinafter admitted, is not good pleading. It should not, however, be treated as a nullity and thereby deprive the defendant of his right to trial or to amend; the proper remedy is by a motion to have the answer made more specific and certain. *Thompson* v. *Wittkop*, 97 App. Div. 642, reversed.

(Argued February 8, 1906; decided February 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 28, 1904, which reversed a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

D. E. Brong for appellant. The answer is sufficient in law to raise an issue of fact. (*Crosley* v. *Kobb*, 22 Wkly. Dig. 570; 3 How. Pr. [N. S.] 37; *Varnum* v. *Hart*, 47 Hun, 188; *Avery* v. *N. Y. C. R. R. Co.*, 29 N. Y. S. R. 918; *Williams* v. *Lindblom*, 68 Hun, 174; *Lyth* v. *Green*, 21 App. Div. 300; *Melcher* v. *Kreiser*, 28 App. Div. 362; *Calkins* v. *Bolton*, 98 N. Y. 511; *Bayliss* v. *Stimson*, 110 N. Y. 621; *People* v. *N. Ry. Co.*, 42 N. Y. 220; *Smith* v. *Gratz*, 59 How. Pr. 274; *Haines* v. *Herrick*, 9 Abb. [N. C.] 385; *Barton* v. *Griffin*, 24 Misc. Rep. 455.) This answer is not open to the objection that it merely gives a different version or statement of the facts contrary to those stated in the complaint unaccompanied by any denial. (*Allis* v. *Leonard*, 22 Alb. L. J. 28; 46 N. Y. 688.) The plaintiff's remedy is by special motion to compel the defendant to make the answer definite and certain, or at least by demurrer. (Abb. Tr. Br. §§ 579, 580; *Greenfield* v. *M. M. L. Ins. Co.*, 47 N. Y. 437; *Potter* v. *Frail*, 67 How. Pr. 445; *Spies* v. *Roberts*, 18 J. & S. 301; *Burley* v. *G. A. Bank*, 111 U. S. 216; *Smith* v. *Coe*, 179 N. Y. 169; *Gilbert* v. *Cram*, 12 How. Pr. 455; *White* v. *Spencer*, 14 N. Y. 247; *King* v. *McKeller*, 109 N. Y. 225; *Simser* v. *Cowan*, 56 Barb. 397; *Tillson* v. *Clark*, 45 Barb. 181; *Reynolds* v. *Lownsbury*, 6 Hill, 535.)

Ray M. Stanley for respondents. The defendant's answer is a nullity. (*Avery* v. *N. Y. C. & H. R. R. R. Co.*, 24 N. Y. S. R. 918; *Lyth* v. *Green*, 21 App. Div. 300; *Baylis* v. *Stimson*, 110 N. Y. 621; *Melcher* v. *Kreiser*, 28 App. Div. 362; *Williams* v. *Lindblom*, 68 Hun, 174.) The second

clause of defendant's attempted denial is absolutely unauthorized. (*M. Mfg. Co.* v. *Salter*, 15 Abb. [N. C.] 305; *Clark* v. *Dillon*, 97 N. Y. 373; *Barton* v. *Griffin*, 36 App. Div. 572; *Miller* v. *McClosky*, 9 Abb. [N. C.] 303.) Where there is no general or specific denial of the material allegations of a complaint, the material facts alleged are not controverted or put in issue by matter alleged in the answer which is merely inconsistent with the facts set forth in the complaint or from which a denial of such facts may be implied or inferred. The specific facts stated must be such as necessarily controvert the allegations of the complaint. (*Wood* v. *Whiting*, 21 Barb. 190; *Marston* v. *Swett*, 66 N. Y. 210; *Rodgers* v. *Clement*, 162 N. Y. 428; *Smith* v. *Coe*, 170 N. Y. 167; *Soper* v. *St. R. P. Co.*, 76 App. Div. 411; *Fleischman* v. *Stern*, 90 N. Y. 110; *West* v. *A. E. Bank*, 44 Barb. 179.) Plaintiffs seasonably raised the objection to the sufficiency of the answer. (*Wachter* v. *Quenzer*, 29 N. Y. 547; *Tilson* v. *Clark*, 45 Barb. 178.)

HAIGHT, J. The order of reversal as entered by the Appellate Division was solely upon the ground that the answer did not contain any general or specific denial of the allegations of the complaint in conformity with the requirements of section 500 of the Code of Civil Procedure. The cause of action set forth in the complaint was for seats furnished a church at the special instance and request of the defendant, for which the plaintiff was to be paid what the same were fairly and reasonably worth. The denial contained in the answer is as follows: "And for his second and further separate defense this defendant further denies all the allegations contained in folios four and five of said complaint except as hereinafter expressly specifically admitted or otherwise alleged, denied and controverted." Then follows the third allegation of the answer as a separate defense to the effect that the seats were furnished to the church under an agreement to pay three dollars for each seat and that the same had been paid for in full.

While we have examined all of the authorities cited by

counsel in this case bearing upon the question, we shall not here allude to them or attempt to harmonize them further than to state that we have found none which we regard as controlling upon this court. Before the Code, pleadings were strictly construed against the pleader, but under the Code they "must be liberally construed with a view to substantial justice between the parties." (Code Civ. Pro. § 519.) No particular form of denial of the allegations of the complaint is prescribed. The denial, however, should be clear and specific, such as to at once apprise the parties and the court of the matter controverted. The form used by the defendant in this case is not to be commended. It is about as cumbersome as any that could well be devised, and has often been severely criticised by the courts. The original folios upon a complaint are almost always changed in the record made up for review, and consequently it then becomes impossible for the appellate court to determine the matter controverted. In many cases the form of denial used might be so indefinite and uncertain as to leave a doubt as to the allegations of the complaint intended to be put at issue, but in such cases we doubt the propriety of treating the denial as a nullity and thereby depriving the party of his right to trial or to amend his pleadings. We think the better practice is to move to have the pleading made more specific and certain.

In this case the original folios are given. The denial is as to the allegations contained in folios four and five. Folio four begins with a paragraph of the complaint, and that folio and the one which follows it embraces all of the remaining allegations of the complaint down to the demand for judgment, so that there is no chance for misunderstanding as to the matter denied in that regard. The allegation which follows, to the effect that the contract was to pay a definite sum agreed upon for each seat furnished, is also so clear and specific as to leave no room for doubt as to the issue raised for trial. We, therefore, are of the opinion that the pleading in this case as construed by the trial court afforded "substantial justice between the parties."

The order of the Appellate Division should be reversed and the judgment entered upon the verdict affirmed, with costs in all courts.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT and CHASE, JJ., concur.

Ordered accordingly.

HARRY CONTENT et al., Respondents, *v.* PETER BANNER, Appellant.

1. CONVERSION — SALE OF SECURITIES BY STOCKBROKER WITHOUT NOTICE OF TIME OR PLACE. Where a stockbroker buys securities for a customer, although he advances the whole amount necessary for the purchase, instead of requiring a margin, the relation of pledgee and pledgor exists between the parties; and a sale of the securities by the broker, without notice of the time and place of sale, constitutes a conversion, in the absence of an agreement dispensing with such notice or providing for otherwise disposing of them.

2. INSUFFICIENT NOTICE. A written notice to take up securities bought under such circumstances, or to supply sufficient margin to carry them, stating that unless the customer made suitable arrangements "before Wednesday next (August 13) we shall sell this stock for your account and hold you responsible for the loss," is defective in that it contains no proper statement as to the time or place of sale; and in the absence of any agreement dispensing with such notice, a sale "on the curb," the customer having failed to respond on the day specified, constitutes a conversion.

Content v. *Banner*, 96 App. Div. 625, reversed.

(Argued January 18, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 20, 1904, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Otto Horwitz for appellant. The relationship of pledgee and pledgor existed between plaintiffs and the defendant. (*Markham* v. *Jaudon*, 41 N. Y. 235; *Baker* v. *Drake*, 66

N. Y. 518; *Gruman* v. *Smith*, 81 N. Y. 25.) The relationship of a stockbroker to his client being that of pledgee and pledgor, the stockbroker must, before selling the stock of his client, the pledgor, give notice of the time and place of sale to the client, and the mere failure of the client to furnish margins after notice of decline in the market and a demand for margins is insufficient to authorize the broker to sell the stock. (*Lewis* v. *Graham*, 4 Abb. Pr. 106; *Brown* v. *Ward*, 3 Duer, 660; *Taylor* v. *Ketcham*, 5 Robt. 507; *Markham* v. *Jaudon*, 41 N. Y. 235; *Gruman* v. *Smith*, 81 N. Y. 25; *Strong* v. *N. M. B. Assn.*, 45 N. Y. 718.) The sale by the plaintiffs of defendant's stock on the "curb" was an unauthorized and improper sale. (*Rankin* v. *McCullough*, 12 Barb. 103; *Usher* v. *Van Vranken*, 48 App. Div. 416; *Brass* v. *Worth*, 40 Barb. 648; *Dykers* v. *Allen*, 7 Hill, 497; *Wickes* v. *Hatch*, 62 N. Y. 435; *Ogden* v. *Lathrop*, 65 N. Y. 152; *Brown* v. *Ward*, 3 Duer, 660; *Wheeler* v. *Newbould*, 16 N. Y. 392.) The sale of the defendant's stock by the plaintiffs being an invalid and illegal sale, constituted a conversion by the plaintiffs of defendant's stock for which they were answerable in damages. (*Minor* v. *Beveridge*, 141 N. Y. 399.) The court erred in ruling as a matter of law that the sale by the plaintiffs of defendant's stock was a lawful and valid sale, and further erred in ruling as a matter of law that the amount of plaintiffs' recovery is not to be reduced by reason of any irregularity in the sale or notice of sale, and further erred in refusing to submit to the jury the question as to the damages sustained by the defendant through said sale. (*Ex parte Coykendall*, 6 Cow. 33; *Carpenter* v. *Sheldon*, 5 Sandf. 97; *Hodgkins* v. *Mead*, 119 N. Y. 172; *Briggs* v. *Hilton*, 99 N. Y. 531; *Parker* v. *Lanney*, 58 N. Y. 469; *Hazewell* v. *Coursen*, 81 N. Y. 630; *Ladd* v. *Æ. Ins. Co.*, 147 N. Y. 478; *Higgins* v. *Eagleton*, 155 N. Y. 466; *Ten Eyck* v. *Whitbeck*, 156 N. Y. 341.)

Charles E. Rushmore for respondents. Notice of the intended sale was sufficient and the defendant is estopped

from criticising the fact or the form of such notice. (*Wright* v. *Bank of Metropolis*, 110 N. Y. 245; *Markham* v. *Jaudon*, 41 N. Y. 239; *Stokes* v. *Mackey*, 147 N. Y. 234; *Conwell* v. *Haight*, 21 N. Y. 462; *Shaw* v. *R. Ins. Co.*, 69 N. Y. 286; *Van Tassel* v. *G. Ins. Co.*, 28 App. Div. 163; *Hart* v. *Hart*, 45 App. Div. 280; *Hicks* v. *B. A. Ins. Co.*, 162 N. Y. 304.)

WILLARD BARTLETT, J. This action was brought to recover a balance alleged to be due upon a stock transaction in which the plaintiffs acted as stockbrokers for the defendant.

The plaintiffs on April 21, 1900, bought stocks for the defendant, as his brokers, without requiring the advance of any margin by him and carried the same for him for several months when they requested the defendant to receive the shares so purchased and pay the purchase price thereof and their commissions. He did not comply with this request and thereafter, under date of August 8, 1900, the plaintiffs sent to the defendant a letter, the only portion of which material to this appeal is as follows: "Inasmuch as the stock has not yet been sold we wish to give you a further opportunity to take it up or to supply us with sufficient margin to carry it if you so desire. If, however, you do not make suitable arrangement in this respect before Monday next (August 13) we shall sell this stock for your account and hold you responsible for the loss."

No further or other notice of the intended sale was given. On August 13, 1900, the stocks were sold by the plaintiffs "on the curb," that is to say, in the roadway near the sidewalk in Broad street in the city of New York, where brokers gather and deal in securities which are not listed at the New York Stock Exchange. The sale resulted in a loss with which the plaintiffs sought to charge the defendant in this action. The trial judge ruled that the amount of the plaintiffs' recovery was not to be reduced by reason of any irregularity in the notice of sale or by any irregularity in the sale itself; to which ruling the defendant excepted. Exception was also taken by the defendant to the refusal of the court to submit

to the jury the question of the market value of the stock and to the refusal to submit the question as to what was the highest market value between August 13 and September 15, 1900. The plaintiffs recovered a verdict for the whole amount claimed.

In this case, although the brokers advanced the whole of the amount necessary to purchase the securities instead of only a percentage thereof (which has come to be commonly known as a margin) the relation between them and their customer was that of pledgees and pledgor, as in *Markham* v. *Jaudon* (41 N. Y. 235), *Baker* v. *Drake* (66 N. Y. 518) and many other cases in this state based upon speculative stock transactions. Under the contract, arising by operation of law, out of the relation between the parties, a sale of the stock by the brokers, without notice of the time and place of sale, constituted a conversion, in the absence of an agreement dispensing with such notice or providing for otherwise disposing of the pledged property. No such stipulation existed here. The notification of the plaintiffs' intention to sell the stock, contained in their letter of August 8, 1900, was manifestly defective and insufficient. It contained no statement of the time when it was proposed to offer the stock for sale nor any intimation whatever as to the place at which it would be sold. The language was such, it is true, as to convey the idea that no sale would be attempted before the following Monday, but there was no other indication in reference to time. It was impossible to gather from the terms of the notice whether the sale would take place on Monday, or a week or a month thereafter, or on any day in the intervening period. As to the proposed place of sale, the notice does not contain a scintilla of information. It requires only the most cursory reading of the letter to lead to the conclusion that if the defendant was entitled to any notice at all of the time and place of the sale of the stocks which the plaintiffs were carrying for him such notice was not furnished by that letter.

But it is suggested that the defendant was not entitled to any notice of sale whatever, because by his answer and upon

the trial he took the position that the stocks were purchased under an arrangement whereby the plaintiffs were bound to sell them for the defendant's account, after carrying them a few days, when instructed to do so; that the defendant ordered them to be sold within three days; and that the plaintiffs neglected to comply with the order, by reason of which the defendant sustained damage to the amount of $525. The jury found against the defendant on this claim, but it is not perceived that there is anything in it which precludes the defendant from insisting that if the plaintiffs were carrying the stocks for him under his agreement to pay for them when required, as the plaintiffs asserted was the fact, they could not lawfully sell the stock without notice.

The sale "on the curb" without notice was clearly a conversion of the pledged stock. "For a conversion of the pledge, the pledgee was liable for the damages sustained by the defendant, but whether they would equal the amount of the claim would depend upon the facts developed." (*Gruman* v. *Smith*, 81 N. Y. 25.) In holding, as he did in substance, that the sale as made was not a conversion, the learned trial judge took the question of the defendant's damages by reason of the conversion out of the case altogether. This, we think, was error demanding a reversal of the judgment, and a new trial should be granted, costs to abide event.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ., concur.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN HILL, Respondent, *v.* HENRY HESTERBERG, as Sheriff of the County of Kings, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. AUGUST SILZ, Respondent, *v.* HENRY HESTERBERG, as Sheriff of the County of Kings, Appellant.

1. CONSTITUTIONAL LAW — FOREST, FISH AND GAME LAW — PROVISION PROHIBITING POSSESSION OF GAME DURING CLOSE SEASON CONSTITUTIONAL (CONST. ART. 1, § 6). The provisions of the Forest, Fish and Game Law (L. 1900, ch. 20, as amd. by L. 1902, ch. 194; L. 1902, ch. 317, and L. 1904, ch. 588), prohibiting the possession of game coming from without the state during the close season is not unconstitutional as a deprivation of property without due process of law and is a valid exercise of the police power of the state.

2. POWER OF CONGRESS TO AUTHORIZE ENACTMENT OF NEW YORK STATE LAW PROHIBITING IMPORTATION AND POSSESSION OF FOREIGN GAME DURING CLOSE SEASON. Congress can authorize an exercise of the police power by a state, which without such authority would be an unconstitutional interference with commerce; and the act of Congress, passed May 25, 1900, providing, "That all dead bodies or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals, or game or song birds transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," confers upon the state of New York the power to enact laws prohibiting the possession of the bodies or flesh of game animals or birds, within certain periods, whether the same be taken within the state or imported from another state or from foreign countries.

3. CONSTRUCTION OF COMPLAINT UPON WHICH WARRANT FOR VIOLATION OF GAME LAW IS ISSUED. Where the affidavit upon which a warrant was issued for the arrest of a defendant for violating the provisions of the Forest, Fish and Game Law states that the defendant had in his possession, within the prohibited time, certain dead game birds, to wit, one imported golden plover and one imported grouse, the further statement "That said imported golden plover and imported grouse are different varieties of game birds from the game birds known as plover and grouse

in the state of New York, and from any birds native to America. They are different in form, shape, size, color and marking from the game birds known as plover and grouse in the state of New York," cannot be urged as a defense, since such statement should be construed as meaning, not that the bird so possessed was not a grouse, but that it was a different variety of grouse, different in form, shape and color, from that which is native to the state of New York; it is for the legislature to determine how far it is necessary or wise to include within the penal provisions of the statute birds of the same family and of a similar character though differing in some respects.

Matter of Hill, 109 App. Div. 917, reversed; *People ex rel. Silz* v. *Hesterberg*, 109 App. Div. 295, reversed.

(Argued January 22, 1906; decided February 27, 1906.)

APPEAL in each of the above-entitled proceedings from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 29, 1905, which reversed an order of Special Term quashing a writ of habeas corpus and directing that the relators be discharged from the custody of the defendant.

The facts, so far as material, are stated in the opinion.

Julius M. Mayer, Attorney-General (*Alexander T. Mason* of counsel), for appellant. The provisions of the Forest, Fish and Game Law prohibiting the possession of plover and grouse during the close season apply to all kinds and varieties of plover and grouse, whether produced in this state or imported here from abroad. (L. 1900, ch. 20; L. 1902, ch. 194; L. 1902, ch. 317; L. 1904, ch. 588, §§ 106, 108, 140, 141; *Rosenplaenter* v. *Roessle*, 54 N. Y. 265.) The Game Law as above construed is a fair, reasonable and appropriate exercise of the police power of the state. (*Lawton* v. *Steele*, 152 U. S. 133; *Phelps* v. *Racey*, 60 N. Y. 10; *Roth* v. *State*, 51 Ohio St. 209; *Javins* v. *United States*, 11 App. Cas. [D. C.] 345; *State* v. *Farrell*, 23 Mo. App. 176; *Commonwealth* v. *Savage*, 155 Mass. 278; *Whitehead* v. *Smithers*, L. R. [2 C. P. D.] 553; *Ex parte Maier*, 103 Cal. 479; *Magner* v. *People*, 97 Ill. 331; *Merritt* v. *People*, 48 N. E. Rep. 325; *State* v. *Randolph*, 1 Mo. App. 15.) The act of the legislature making the possession of imported

game unlawful does not violate the provisions of the State or Federal Constitutions. (*People* v. *Bootman*, 180 N. Y. 1; *Alexander* v. *Worthington*, 5 Md. 488; *Michael* v. *Morey*, 26 Md. 261; *Rohrbach* v. *G. F. I. Co.*, 62 N. Y. 47; *Geer* v. *Connecticut*, 161 U. S. 519; *Matter of Rahrer*, 140 U. S. 545; *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *N. A. V. Co.*, 170 U. S. 438; *Matter of Van Vliet*, 43 Fed. Rep. 761; *Matter of Speckler*, 43 Fed. Rep. 653; *State* v. *Bixman*, 162 Mo. 1; *Matter of Bergen*, 115 Fed. Rep. 339; *Storace* v. *Rossi*, 69 Vt. 353; *State* v. *Intoxicating Liquor*, 95 Me. 140.) The provisions of the Lacey Act relate to foreign as well as to interstate commerce, and birds imported into New York state from a foreign country are subject upon arrival to the police laws of the state. (*A. S. Co.* v. *Speed*, 192 U. S. 519; *Brown* v. *State*, 12 Wheat. 419; *May* v. *New Orleans*, 178 U. S. 496.)

John F. Clarke, District Attorney (*Robert H. Elder* of counsel), for appellant. Congress on May 25, 1900, passed the so-called Lacey Act, which subjected game taken without the state and imported therein to the police laws of the state. This law had the effect of making local police law operative as to such importations to the full extent of the purpose and end of such statute of Congress. (*Vance* v. *Vandercook Co.*, 170 U. S. 438; *People* v. *Bootman*, 180 N. Y. 1.) The theory advanced by the learned court below that the Lacey Act in extending the application of local police laws has no reference to birds imported from foreign states but only to those imported from domestic states is inaccurate. (*People* v. *Bootman*, 180 N. Y. 1.)

Edward Lauterbach, Edward R. Finch and *John B. Coleman* for August Silz, respondent. The possession of the birds admitted to have been possessed by Silz is not forbidden by the provisions of chapter 20 of the Laws of 1900 known as the Forest, Fish and Game Law. (*People* v. *B. F. Co.*, 164 N. Y. 93; *Savings Bank* v. *U. S.*, 86 U. S. 227; *People* v.

Bootman, 180 N. Y. 1.) The question as to the constitutionality of the provisions of the Forest, Fish and Game Law, as applied to the case at bar, is not controlled by the decision in the case of *People* v. *Bootman* (180 N. Y. 1). (*Matter of Hearst* v. *Woelper*, 183 N. Y. 274; *A. S. Co.* v. *Speed*, 192 U. S. 519.) The provisions of the Forest, Fish and Game Law are unconstitutional in that they deprive the individual of his property without due process of law. (*Geer* v. *Connecticut*, 161 U. S. 519; *People* v. *A. B. Co.*, 42 Misc. Rep. 329; *Foster* v. *Scott*, 136 N. Y. 577; *People* v. *Bootman*, 95 App. Div. 469; *People* v. *Marx*, 99 N. Y. 377; *People* v. *Biesecker*, 169 N. Y. 53.) The provisions of the Forest, Fish and Game Law are unconstitutional, in that they unjustifiably restrict and interfere with foreign commerce. (*Bowman* v. *C. & N. W. Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Matter of Rahrer*, 140 U. S. 545; *Vance* v. *Vandercook*, 170 U. S. 545; *Rhodes* v. *Iowa*, 170 U. S. 412; *Colon* v. *Lisk*, 153 N. Y. 196; *Forster* v. *Scott*, 136 N. Y. 584; *Mugler* v. *Kansas City*, 123 U. S. 661; *Robbins* v. *S. T. District*, 120 U. S. 493; *People* v. *Hawkins*, 157 N. Y. 1.)

John L. Hill for John Hill, respondent.

CULLEN, Ch. J. The relators were arrested on warrants charging them with a violation of the Game Law. They sought discharge from their arrest by writs of *habeas corpus*. On the return to those writs they were remanded to custody. On appeal to the Appellate Division the orders of the Special Term were reversed and the relators discharged from custody. From those orders these appeals are taken. As the affidavits on which the warrants for the arrest of the relators were issued differ materially in their statements of facts, we will first consider the one made in the Hill case. The affidavit avers that on the 3rd day of March said John Hill did have in his possession in the Clarendon Hotel, in the borough of Brooklyn, one dead body of a bird known as a golden plover,

and one dead body of a fowl commonly called a grouse; that, as the affiant was informed and believed, the said plover and grouse were taken without the state of New York, to wit, from England and Russia, and thence brought into the borough of Brooklyn.

The Forest, Fish and Game Law (Chap. 20, Laws 1900, amended chaps. 194 and 317, Laws 1902; chap. 588, Laws 1904), by sections 106 and 108, enacts that grouse shall not be taken or possessed from January 1st to October 31st, nor plover from January 1st to July 15th. By section 140 of said act grouse is defined to include ruffed grouse, partridge and every member of the grouse family. By section 141 the inhibition enacted by the other sections of the statute is made to apply to fish, game or flesh coming from without the state, as well as to that taken within the state. By section 119 any one violating the provisions of the statute hereinbefore recited is guilty of a misdemeanor and liable to a fine of twenty-five dollars for each bird taken or possessed in violation thereof. The relator was in possession of the birds during the prohibited period, and, hence, was guilty of a misdemeanor, unless he is relieved from the penalties prescribed by the statute by the fact that the birds were imported from foreign countries. We shall not discuss at any length the claim of the relator that the statute contravenes the Constitution of this state as depriving the relator of his property without due process of law. That question has been settled adversely to that claim by the decisions of this court in *Phelps* v. *Racey* (60 N. Y. 10) and *People* v. *Bootman* (180 N. Y. 1), in which it was held within the power of the legislature, in order to effect the preservation of game within the state, to enact not only a close season during which the possession of such game should be unlawful, but also to enact that the possession in the state during such season of game taken without the state should be equally unlawful. The *Phelps* case is cited by the Supreme Court of the United States in *Geer* v. *Connecticut* (161 U. S. 519), in which the validity of a statute of that state was upheld, not only on the ground that the original owner-

ship of wild game is in the state, but on the further ground that the preservation of such game is a valid exercise of the police power of the state. To the argument that the exclusion of foreign game in no way tends to the preservation of domestic game, it is sufficient to say that substantially the uniform belief of legislatures and people is to the contrary, and that both in England and many of the states in this country legislation prohibiting the possession of foreign game during the close season has been upheld as being necessary to the protection of domestic game, on the ground that without such inhibition or restriction any law for the protection of domestic game could be successfully evaded. (*Whitehead* v. *Smithers*, L. R. [2 C. P. Div.] 553; *Ex parte Maier*, 103 Cal. 476; *Magner* v. *People*, 97 Ill. 320; *Missouri* v. *Randolph*, 1 Mo. App. 151; *Stevens* v. *State*, 89 Md. 669; *Roth* v. *State*, 51 Ohio St. 209; *Commonwealth* v. *Savage*, 155 Mass. 278.) The case of *Phelps* v. *Racey* (*supra*) has never been overruled by this court. In the opinion delivered in *People* v. *Buffalo Fish Company* (164 N. Y. 93) Judge O'BRIEN took two positions: *First*, that the exclusion of fish taken without the state was invalid as interfering with the power of Congress to regulate foreign and interstate commerce; and, *second*, that under a proper construction of the Game Law as it then stood the statute was applicable only to fish taken within the state. It was this second ground alone which received the assent of the majority of judges and on which the decision in the case proceeded. This ground has been removed by the amendment of the statute already cited, which makes it applicable to game taken without the state. *People* v. *Bootman* (*supra*) re-affirmed the doctrine of *Phelps* v. *Racey* and the validity of the legislation before us, at least so far as the Constitution of this state is involved. In that case while we affirmed the decision below because the offenses for which the defendant was prosecuted were committed before the amendment to the statute, we felt called upon to express our opinion on the whole subject, so that the citizen might not be misled by the opinion rendered in the court below and thus unwittingly

subject himself to severe penalties. If as is claimed the views then expressed by the court on the subject now before us were obiter and not necessary to the decision made, it is sufficient to say that we adhere to them, not on the ground of *stare decisis* but because they command our approval. Therefore, if the act of Congress, passed May 25th, 1900, commonly termed the "Lacey Act," empowered the state to enact the legislation before us, it is unnecessary for us to enter into any examination of the question of interference with foreign and interstate commerce, discussed, but not decided, in *People* v. *Buffalo Fish Company*.

That Congress can authorize an exercise of the police power by a state, which without such authority would be an unconstitutional interference with commerce, has been expressly decided by the Supreme Court of the United States in *Matter of Rahrer* (140 U. S. 545). The question before us is merely the interpretation of the Lacey Act, which the learned counsel for the respondents contend applies solely to interstate shipments and not to importations from foreign countries. The act is entitled: "An Act to enlarge the powers of the Department of Agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes." The first section relates to the department of agriculture; the second prohibits the importation of any foreign wild animal or bird except under special permit from that department, providing that it shall not restrict the importation of natural history specimens nor caged birds, such as domesticated canaries, parrots and the like. It then forbids absolutely the importation of the mongoose, flying foxes, the English sparrow and such other birds as the secretary of agriculture may deem injurious to the interest of agriculture or horticulture. The third section forbids the delivery to a common carrier for shipment from one state to another of any wild animals or birds killed in the state in violation of its laws. The fifth section deals with the transportation into any state of animals killed without the state. It is as follows: "That all dead bodies or parts thereof, of

any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its Police Powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation, or sale of birds or bird plumage, manufactured from the feathers of barnyard fowl." It is contended that the title of the statute tends to show that the operation of section 5 is confined to shipment from other states and not to importation from foreign countries. If the title of an act could limit its effect, which it cannot (Potter's Dwarris on Statutes, p. 102), still this claim is without foundation. The first two sections of the act deal with the department of agriculture, and the reference thereto in the title is appropriate. The third and fourth sections deal with interstate transportation of game killed in violation of local laws, and the reference in the title "prohibit the transportation by interstate commerce of game killed in violation of local laws" is equally appropriate. The fifth section, which is the one before us, deals with an entirely different matter, transportation into a state, not out of a state, and is embraced in the title of the statute only under the designation "and for other purposes." As to this subject, therefore, the title in no respect tends to limit the effect of the act. It is difficult to see any reason why Congress should have sought to discriminate between the bodies of game, song birds or wild animals brought into a state from other states and those brought from foreign countries. The object of the legislation was to enable the states by their local law to exercise a power over the subject of the preservation of game and song birds, which without that

legislation they could not exert. Every consideration that led Congress to think it wise to confer on the state of New York, as well as on other states, power (which is practically that of prohibition during the close season, at least for the purposes of sale) over the importation of partridges from New Jersey, Pennsylvania or Connecticut, is equally applicable to the importation of such birds from Canada. The obstacle to the successful enforcement of the game laws of the state would be as great in the one case as the other, and as Canada borders on the United States for a distance of three thousand miles the practical danger would be as great in one case as in the other, whatever it might be in the case of an importation from Europe. But it is said Congress permits the importation of foreign game and collects the duty thereon, and it cannot have intended to allow property thus imported to be confiscated. The proposition that Congress allows the importation of foreign game is true only in a restricted sense. By the "Lacey Act" Congress determined to aid the states in the enforcement of their game laws, but did not deem it wise to enact a game law of its own, and this for the very obvious reason that the game laws of the different states vary greatly, a variation justified in no small degree by varying climatic conditions. It would be unwise to entirely prohibit the importation of game into the country during a part of the year during which in some of the states the taking and consumption of such game is lawful. So Congress practically said to the citizen: We do not prohibit the importation of foreign game, but subject it to the local laws, and you must see to it, at your risk, that you do not violate those laws. The term "transported" is used in the Wilson Act of Congress relative to intoxicating liquors (enacted August 8, 1890), as in the present act. Yet it seems incredible that Congress intended to suffer the state of Maine to seize liquor in original packages when brought from Massachusetts, but not when brought from Canada or Europe. The words of the section before us are sufficiently comprehensive to include all game brought into the state from whatever place, and we do not think it

profitable to enter into a verbal analysis save in one respect. It is urged that the concluding sentence of the section, "This act shall not prevent the importation, transportation or sale of birds or bird plumage manufactured from the feathers of barnyard fowl," excludes all birds from its operation. We think not. The qualification "manufactured from the feathers of barnyard fowl" applies as well to birds as to bird plumage. Birds mentioned in this sentence are plainly artificial birds, and so the treasury department of the United States has ruled.

The case of Silz is somewhat different. The affidavit on which the warrant in this case was issued creates a strong suspicion that the prosecution was instituted by collusion. It states not only that the defendant had in his possession the prohibited game, but also almost every fact by which the defendant's counsel hopes to relieve his client from the penalties of the law, facts which it is difficult if not impossible to see how they could have been within the affiant's knowledge. For that reason we should be inclined to refuse to entertain the cause had not the attorney-general intervened and prosecuted the appeal. Substantially all the questions raised by the affidavit, save one, are disposed of by the views we have already expressed. The exception is the statement in the affidavit "That said imported golden plover and imported grouse are different varieties of game birds from the game birds known as plover and grouse in the state of New York and from any birds native to America. They are different in form, shape, size, color and marking from the game birds known as plover and grouse in the state of New York." Of course if the birds, the possession of which is charged against the relator, are not grouse or birds of the grouse family, then no crime is stated in the affidavit and the relator should be discharged. But in view of the express allegation at the commencement of the affidavit that the defendant was possessed of one imported grouse, we are inclined to the view that the statement quoted should be construed as meaning not that the bird so possessed was not a

grouse, but that it was a different variety of grouse from that which is native to the state of New York. So construed this fact constitutes no defense, nor does the allegation that they are different in form, shape and color from native birds. It was for the legislature to determine, in the protection of native game, how far it was necessary or wise to include within the penal provisions of the statute birds of the same family and of a similar character, though differing in some respects. Of course, this statement is made within limits. To protect pigeons, turkeys could not be excluded. In the present case, however, we are clear that the legislature has acted within its power.

The order of the Appellate Division in each case should be reversed, that of the Special Term affirmed, and the relators remanded to custody.

GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ., concur.

Order reversed, etc.

WILSON R. HUNTER, Respondent, *v.* MUTUAL RESERVE LIFE INSURANCE COMPANY, Appellant.

1. INSURANCE — STATUTORY STIPULATIONS REQUIRED OF FOREIGN CORPORATIONS AS A CONDITION OF DOING BUSINESS IN A STATE ARE FOR THE BENEFIT OF THOSE ONLY WHO CONTRACT IN RELIANCE THEREON. A statute requiring a foreign insurance company, as a condition of doing business in a state, to execute a power of attorney authorizing the state insurance commissioner to represent it as to the service of process in all proceedings against it therein, which shall be "irrevocable so long as any liability of the company remains outstanding" in the state, is primarily designed for the protection of those citizens of the state who in reliance thereon acquire rights under policies executed with them or for their benefit while they are citizens; it does not create and perpetuate a local forum to which, under the guise of an assignment to a citizen, non-residents may resort for the purpose of instituting litigation upon contracts issued to them at their homes, which by no possibility can be regarded as having been made in reliance upon such provision, against a corporation subject to service at their homes and which prior thereto has attempted in good faith to withdraw from the state resorted to.

2. EFFECTIVE REVOCATION, AS TO NON-RESIDENTS, OF POWER OF ATTORNEY AUTHORIZING SERVICE OF PROCESS UPON STATE INSURANCE COMMISSIONER. Where a foreign insurance company, owing to adverse legislation, serves upon such insurance commissioner a written notice withdrawing from the transaction of business in the state and revoking such power of attorney, and thereafter does no business therein, except that premiums and losses on policies theretofore issued to residents of the state were remitted to and from the home office by mail, and in four specific instances, three of which involved the settlement of losses under or a re-adjustment of such policies, and in the fourth a special adjuster, appointed to settle a claim with a supposed non-resident, followed him for such purpose into the state in question into which he had removed, the revocation of the power of attorney is effective as against non-residents who, having taken out policies in their own states, after such revocation, assigned claims against the company arising therefrom to residents of the state for the purpose of placing them in judgment therein; since under such circumstances the company cannot be regarded as having continued the ordinary, substantial and active business in the state necessary to keep alive its power of attorney as to such parties.

3. WHEN POWER OF ATTORNEY, IRREVOCABLE ON ITS FACE, MAY BE REVOKED. Nor does the statutory provision as to the irrevocability of the power of attorney prevent its effective revocation as to such non-residents and permit the subsequent prosecution by their assignees of such claims by service upon the insurance commissioner; since a power of attorney, although literally irrevocable, may be revoked unless some interest or right founded or created upon the faith thereof requires its perpetuation and continuance, and by no possibility can such claims be regarded as having been contracted or acquired in reliance thereon; judgments, therefore, based upon such service in actions upon the claims, are void and of no effect.

Hunter v. *Mutual Reserve Life Ins. Co.*, 97 App. Div. 222, modified.

(Argued January 15, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 4, 1904, in favor of plaintiff upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

The nature of the controversy and the facts, so far as material, are stated in the opinion.

Frank R. Lawrence, *George Burnham, Jr.*, and *Gordon T. Hughes* for appellant. Where a state, having power to

exclude a foreign corporation, admits it upon condition that it agrees to maintain an agency within the state for the service of process, or that it execute a power of attorney for service to a general agent or state officer, such condition or agreement is exacted for the benefit of those who may do business with the company under the permission granted it to enter the foreign state. Such persons, and such only, are the beneficiaries of the agreement or power of attorney. They only can take advantage of it or enforce it. Persons contracting with the company in the state of its creation, or in any state other than that which requires the agency to be established or power to be given, are strangers to the power of attorney, and have no right to have it kept in force for their benefit. (*L. Ins. Co.* v. *French*, 18 How. [U. S.] 404; *L. Ins. Co.* v. *Meyer*, 197 U. S. 407; *C. M. L. Ins. Co.* v. *Spratley*, 172 U. S. 602; *M. R. L. Ins. Co.* v. *Phelps*, 190 U. S. 147; *H. B. Society* v. *Meuhl*, 32 Ky. L. R. 1378; *G. Ins. Co.* v. *Ashby*, 23 Ky. L. R. 1564; *Biggs* v. *M. R. L. Ins. Co.*, 128 N. C. 5; *Moore* v. *M. R. L. Ins. Co.*, 129 N. C. 31; *Fisher* v. *Ins. Co.*, 136 N. C. 217.) In January and February, 1902, when service of the summons in these four cases was made upon the insurance commissioner of North Carolina the company was not engaged in business in North Carolina. (*McCall* v. *Gilbert*, 44 Hun, 522; *K. T. Co.* v. *Jarman*, 187 U. S. 197; *Cady* v. *Colonies*, 119 Fed. Rep. 420; *Frawley* v. *P. C. Co.*, 124 Fed. Rep. 259; *Doe* v. *S. B. Co.*, 104 Fed. Rep. 684; *U. S.* v. *A. B. T. Co.*, 29 Fed. Rep. 17; *People* v. *A. B. T. Co.*, 117 N. Y. 252.) So far as the New York and New Jersey policyholders are concerned, the power of attorney was not only revoked by the company in May, 1899, but it was also revoked by the act of the state of North Carolina itself, which took effect June 1, 1899. (*Doyle* v. *C. Ins. Co.*, 94 U. S. 535; *People* v. *E. T. Co.*, 96 N. Y. 387; *St. Clair* v. *Cox*, 106 U. S. 350.)

Paul Armitage and *Albert P. Massey* for respondent. The defendant company continued to do business in North Carolina after the attempted revocation of the power of

attorney given to the insurance commissioner, and was actually doing business within the state on the date when service of process was made in each of the suits resulting in the four judgments. (*C. M. L. Ins. Co.* v. *Spratley*, 172 U. S. 602; *M. R. L. Ins. Co.* v. *Phelps*, 190 U. S. 147.) The insurance commissioner was, at the time of the service of process herein, the agent of defendant for the purpose of service in any action or legal proceeding of every nature of which the courts of North Carolina had jurisdiction. (*Pringle* v. *Woolworth*, 90 N. Y. 509; *People* v. *L. Ins. Co.*, 7 App. Div. 297; *Gibbs* v. *Q. Ins. Co.*, 63 N. Y. 120; *Douglass* v. *Ins. Co.*, 138 N. Y. 220; *M. R. L. Ins. Co.* v. *Phelps*, 190 U. S. 147; *Gibson* v. *Mfg. Ins. Co.*, 144 Mass. 81; *Aldich* v. *Blatchford*, 177 Mass. 369; *People* v. *Fire Assn.*, 92 N. Y. 311; *Vose* v. *Cockroft*, 44 N. Y. 415; *Sherman* v. *McKeon*, 38 N. Y. 266; *Phyfe* v. *Eimer*, 45 N. Y. 102.)

HISCOCK, J. The defendant is a life insurance company, organized under the laws of this state. The judgment appealed from awarded recovery upon and for the amount of five personal judgments recovered against it in the state of North Carolina. The validity of said latter judgments as a sufficient basis for the present recovery is dependent upon a purported service of process upon the insurance commissioner of North Carolina as a representative for that purpose of the defendant, the latter in no other manner having been served upon or having appeared in said actions. These original judgments allowed recovery on account of five contracts of insurance issued by defendant, in one case to a resident of North Carolina while it was doing business there, and in the remaining cases to residents, respectively, of New York and New Jersey, who, long after defendant had attempted to withdraw from business in North Carolina, as hereinafter stated, assigned their claims to residents of said state. It is conceded by appellant that the judgment appealed from should be affirmed so far as it allows recovery upon the judgment under the North Carolina policy. But it is claimed that

as to the other purported judgments the courts of the latter state did not acquire jurisdiction by the attempted service of process, and that as to them the judgment before us should be reversed.

We think that the appellant's contention is well founded.

Some of the facts now presented to us and of the principles applicable thereto were fully considered by this court in *Woodward* v. *Mutual Reserve Life Ins. Co.* (178 N. Y. 485), and it will only be necessary now to so far state the facts presented as may be necessary to make plain the reason for distinguishing this case from that.

For several years before March 6, 1899, the defendant had been engaged in transacting its life insurance business in North Carolina under provision for service of process upon a local representative for that purpose. Upon the date mentioned the legislature of that state adopted a statute known as the Willard Law, which created an insurance department and provided that no foreign insurance company should be admitted and authorized to do business until it had complied with certain conditions. Among these was one to the effect that it should "by a duly executed instrument constitute and appoint the insurance commissioner, or his successor, its true and lawful attorney upon whom all lawful process in any action or legal proceedings against it might (may) be served, and therein should (shall) agree that any lawful process against it which may be served upon its said attorney should (shall) be of the same force and validity as if served on the company, and the authority thereof should (shall) continue in force irrevocable so long as any liability of the company remains outstanding in this commonwealth." The defendant duly executed and filed an instrument in accordance with the provisions of said act and continued for a time to transact business.

Upon February 10, 1899, the same legislature had adopted a statute known as the Craig Act, which, in substance, provided that any foreign insurance company desiring to transact business in the state of North Carolina after June first then ensuing must become a domestic corporation of said state, and

attaching penalties to any attempt to transact business in violation of said provisions.

May 17, 1899, defendant's board of directors adopted a formal resolution referring to the Craig Act and stating its determination not to comply therewith but instead to withdraw from the transaction of business in said state, and declaring that the appointment of the insurance commissioner as an attorney upon whom process might be served be "cancelled, revoked and annulled." Upon May 20th duly certified copies of this resolution were filed with and in the office of the insurance commissioner. Upon May 18, 1899, the defendant did withdraw all of its agents from the state of North Carolina, and since that date has had no agent therein, premiums upon policies theretofore issued by it to residents of said state being remitted to it by mail at its home office in New York city where the policies and premiums were payable, and losses upon policies issued by it being paid by checks from said office. Outside of this the defendant does not appear to have transacted any business whatever in the state since its withdrawal save in four specific instances, two of them occurring a considerable period before and two a considerable period after the purported institution against it in the foreign state of the suits in question. Without going into the details of these transactions, it may be briefly stated that three of them involved the settlement of losses under or re-adjustment of policies issued to residents of North Carolina, while the defendant was regularly transacting business there, and in the fourth case a special adjuster appointed to settle a claim with a supposed resident of Washington followed him for such purpose into the state of North Carolina whither he had removed.

More than two years after its above-mentioned withdrawal from, and revocation of power of attorney in, North Carolina, residents of New York and New Jersey made assignment of alleged claims under policies there issued to them to residents of North Carolina, and upon them four of the original judgments in question were secured through a purported

service of process under the power of attorney as already stated.

Defendant conceding its liability upon the judgment upon the North Carolina policy, we need spend no considerable time in reviewing and restating the decision of this court in the *Woodward* case, whereby it was in effect held that a stipulation made by a foreign insurance company as a condition of doing business in North Carolina that process might be served in its behalf upon some official as long as there might be any outstanding liability upon its part under any contract of insurance, is an agreement for the benefit of and enforceable by a holder of a policy issued to him in that state which could not be subsequently canceled or evaded by the insurance company so long as the liability in behalf of such policyholder continued. The only question which we need discuss is whether the principles of that case, or any others invoked by the present plaintiff, prevented defendant from so canceling and revoking its power of attorney to the superintendent of insurance under the circumstances disclosed as to bar service upon him as its representative in suits upon claims contracted with persons residing outside of the state of North Carolina, and in no way belonging or transferred to a resident of said state until after the attempted revocation.

The learned counsel for the plaintiff largely bases his contention that defendant did not escape service and jurisdiction in North Carolina upon two propositions. He urges, in the first place, that it did not, as it claimed to, discontinue transacting business there and that for that reason its attempted revocation and withdrawal from the state was ineffective. And, secondly, he insists that the strict letter of its power of attorney to the insurance commissioner for service of process provides that such authority "shall continue in force irrevocable so long as any liability of the company remains outstanding in said (this) commonwealth," and that at the time purported service was made there were existing liabilities outstanding.

It may be assumed at once that if defendant upon a fair

construction of language and of its acts did continue generally to transact and carry on the business of insurance in North Carolina after its purported revocation of its power of attorney and withdrawal from such state, the latter should be held ineffectual to prevent a continuance of the authority of the insurance official to receive service of a summons. The authorization by the company of service upon said official was a condition of its transacting business in said state, and so long as such transaction of business continued the company should not be allowed to escape the consequences of its agreement by any deceptive or apparent withdrawal. We do not, however, think that such was the true character of its acts. The Craig Act, to which reference has already been made, by its provisions excluded defendant from the transaction of business unless it was willing to become a domestic corporation. It is urged that the Willard Act, to which we have also referred, was passed subsequently and was so inconsistent with the former act as to repeal its prohibitory and penalizing provisions. We scarcely agree with this argument. We think that there was room for the provisions of both statutes. The courts of the state where they were passed in effect have so held, which certainly should be a matter of considerable weight with us in this discussion. (*Debnam* v. *S. B. T. & T. Co.*, 126 N. C. 831; *Layden* v. *Knights of Pythias*, 128 N. C. 546.)

But whether this is so or not, the defendant apparently in good faith did regard the provisions of the Craig Act as driving it from the state, in the absence of its willingness to be incorporated as a domestic corporation, and its acts then and thereafter performed indicate an intention actually and in good faith to cease doing business there, and to our minds the facts agreed upon do not show any subsequent modification of this intention. It had already issued policies and contracted liabilities in the state which could not be ignored. It dealt with these liabilities so far as it could from its office in New York and the specific acts which are detailed in the submission arose in connection with the settlement and treatment of old liabilities and old business. We do not think that there

was any such continuation of an ordinary, substantial and active insurance business as would be necessary to keep alive the power of attorney within plaintiff's contention upon this point. (*Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 204; *Frawley* v. *Penn. Casualty Co.*, 124 Fed. Rep. 259; *Doe* v. *Springfield Boiler Co.*, 104 Fed. Rep. 684.)

We, therefore, pass to the consideration of plaintiff's second contention based upon the wording of the power of attorney. In so doing and in construing this instrument and determining whether defendant might revoke it and escape from its consequences as to the majority of the judgments involved in this action, we should keep in mind the policy which led to the adoption of the statute under which it was executed. This policy, briefly stated, involved and voiced the determination upon the part of the state that it would not allow a foreign insurance company to exercise the privilege of doing business within its limits without securing to its citizens who might there be dealt with, an arrangement by which they might institute actions and enforce their contracts and policies at home and without being driven into some foreign state where the company might have its origin and principal place of business.

Statutes requiring the execution of some such agreement by foreign corporations as is invoked against the defendant here, have always been regarded as primarily designed for the protection of the citizens of the state enacting the legislation and who might acquire rights under contracts executed with them or for their benefit while they were such citizens. Such was the underlying principle and view which led to the decisions in the *Woodward* case, in *Lafayette Ins. Co.* v. *French* (18 How. [U. S.], 404), in *Conn. Mut. Life Ins. Co.* v. *Spratley* (172 U. S. 602), and in *St. Clair* v. *Cox* (106 U. S. 350).

It would be quite beyond the spirit of those decisions to hold and we cannot believe that it was the further policy of such legislation to create and perpetuate a local forum to which under guise of an assignment to some resident, non-

residents of far distant states might flock for the purpose of instituting litigation upon contracts issued to them at their homes, against a corporation there readily subject to service and which long before had attempted in good faith to withdraw from the jurisdiction thus hunted out.

Holding this view, we are not willing to decide that defendant's power of attorney was irrevocable as against the four foreign claims upon which recovery was had in North Carolina. It is true that, as the statute required, said power of attorney upon its face was irrevocable so long as any liability of the company should remain outstanding in said state. But it is well settled that a power of attorney, although by its literal terms irrevocable, may be revoked unless some interest or right founded or created upon the faith thereof requires its perpetuation and continuance. (*Hunt* v. *Rousmanier's Admr.*, 8 Wheaton, 174; *Knapp* v. *Alvord*, 10 Paige, 205; Story on Agency [3rd ed.], sec. 476.)

The citizens of North Carolina who had taken contracts from the defendant while it was there doing business in reliance upon this power of attorney which had been executed for their protection under the requirements of the statute were entitled to have it remain unrevoked as provided by its terms. As we have already seen, they are to be regarded as having made their contracts upon the faith of it, and as against them defendant could not escape from its consequences.

But the plaintiffs in the North Carolina actions, who secured their claims from non-resident assignors, occupied no such position. These claims under contracts executed in other states cannot by any possibility be regarded as having been contracted or acquired in reliance upon this provision for service within the state of North Carolina. The assignees, who saw fit to embark upon the acquisition of foreign claims, did not do so in innocent reliance upon the right to bring such suits in their own state, for long before they began the accumulation of claims against the defendant it had formally, and, as we believe, in good faith, withdrawn from the state where they lived and given formal notice of its revocation

of the power of attorney. They did not acquire any such right to enforce jurisdiction in the courts of their own state against the defendant as makes it in any way inequitable or unjust that the power of attorney should be revoked. They are not of the class for whose protection it was originally executed. They have not acquired any rights upon the faith of it. The contracts which they seek to enforce were not secured by defendant from those who expected protection under it. We not only think that it is legal and equitable that defendant's revocation should be effective as against these parties, but that it would be extremely inequitable to hold the reverse.

The learned counsel for the plaintiff has called to our attention many cases which he claims are opposed to the views expressed. While some of them may contain isolated expressions which seem to sustain his view, we think that all of them which ought to be at all controlling upon this court may be clearly distinguished from the case at bar, and we shall only refer briefly to a few of them.

In *Connecticut Mut. Life Ins. Co.* v. *Spratley* (172 U. S. 602) it appeared that plaintiff in error had been engaged for many years in transacting a general insurance business in Tennessee under a statute which, amongst other things, provided that any corporation that had any transaction with persons or concerning any property situated in the state through any agency whatever acting for it within the state should be held to be doing business within the meaning of the act, and also that process might be served upon any agent of the corporation found within the county where the suit was brought no matter what character of agent such person might be. Thereafter, having issued many policies, the corporation assumed to withdraw from the state by recalling its agents and refusing to take new risks or issue new policies within the state. At this time many policies were outstanding upon which it continued to collect premiums through an agent residing in another state. Action was brought in the courts of Tennessee upon policies issued for the benefit of residents of that state while

the company was regularly engaged in doing business there and before its attempt to withdraw, and service in said action was made upon a conceded representative of the company who had come into the state for the purpose of adjusting and settling losses under said policies. It was held that under the circumstances of that case the company was doing business within the state and that service was properly made upon it in the manner indicated. It will be at once observed that independent of the statutory provision defining what should be held to constitute doing business within the meaning of the act under which plaintiff in error operated in the state of Tennessee, this decision was entirely in line with the principle adjudicated by this court in the *Woodward* case. The rights involved were those of a policyholder resident in the state who had there contracted with the company while it was transacting business in that state under a statute which coupled, with permission, certain conditions for the service of process, and the principle upheld was that the company could not defeat the rights of the policyholder and by an attempted withdrawal from the state force him into some foreign jurisdiction.

Mutual Reserve Fund Life Association v. *Phelps* (190 U. S. 147) was based upon the same principle of upholding in favor of a citizen of Kentucky who had received from the plaintiff in error a policy of insurance while it was regularly transacting business in that state, the right to institute action by service of process upon the insurance commissioner in accordance with the provisions of a statute which permitted the company to transact business in that state under conditions allowing such service of process, notwithstanding the company after issuing the policy had attempted to withdraw from the state and cancel the right of service upon the commissioner.

In *Birch* v. *Mutual Reserve Life Ins. Co.* (91 App Div. 384, affirmed without opinion, 181 N. Y. 583) judgment was recovered in the state of North Carolina upon various contracts of life insurance executed in that state while the defendant was regularly engaged in transacting its life insurance

business there. Action was commenced by service of process upon the insurance commissioner, and it was held that such service was good, although the defendant had attempted to withdraw from the state and revoke its power of attorney before service was made.

We see nothing in any of these cases which impairs the force of the conclusions reached by us.

The judgment appealed from should be modified by reducing the same by the amount of $8,792.42, with interest thereon from May 5th, 1902, and as so modified should be affirmed, without costs to either party.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN and WERNER, JJ., concur; WILLARD BARTLETT, J., not sitting.

Judgment accordingly.

CHARLES LOFSTEN, Respondent, *v.* THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

1. CONTRIBUTORY NEGLIGENCE — WHEN QUESTION OF LAW. While the question of contributory negligence is ordinarily one of fact for the jury, yet a party may create by his own acts a controlling presumption that he has been deficient in ordinary caution, and, therefore, guilty of contributory negligence as a matter of law.

2. SAME. Where it appears, in an action brought by a person struck and injured by an electric car while crossing a public street, that, when plaintiff approached the curb of the street through which the railway tracks were laid, he looked and saw a car, distant about fifty feet and approaching at a rate of five or six miles an hour; that from the time he left the curb to cross the street, although there was nothing to obstruct his view or distract his attention, he never looked toward the car or took the slightest pains to ascertain where it was until just before the car struck him, when a shout called his attention to it and looking up he saw it upon him, the plaintiff must be deemed to have not exercised ordinary prudence and is guilty of contributory negligence as a matter of law.

Lofsten v. *Brooklyn Heights R. R. Co.*, 97 App. Div. 395, reversed.

(Submitted January 29, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

October 19, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

I. R. Oeland, *H. F. Ives* and *George D. Yeomans* for appellant. The plaintiff failed to show his freedom from contributory negligence, and the motion to dismiss made at the end of the plaintiff's case and again at the end of the entire case should have been granted. (*Weiss* v. *M. S. R. Co.*, 33 App. Div. 221; *Lynch* v. *T. A. R. R. Co.*, 88 App. Div. 604; *Thompson* v. *M. S. Ry. Co.*, 89 N. Y. 10; *Little* v. *T. A. R. R. Co.*, 83 App. Div. 330; *John* v. *U. Ry. Co.*, 77 N. Y. 161; *Kappus* v. *M. S. R. Co.*, 92 App. Div. 13; *Reed* v. *M. St. Ry. Co.*, 180 N. Y. 315; *Biederman* v. *D. D., etc., R. R. Co.*, 54 App. Div. 291; *Johnson* v. *T. A. R. R. Co.*, 69 App. Div. 247; *Landrigan* v. *B. H. R. R. Co.*, 23 App. Div. 43.)

James C. Cropsey and *Benjamin F. Norris* for respondent. The questions of defendant's negligence and plaintiff's freedom from contributory negligence were properly left to the jury. (*Kettle* v. *Turl*, 162 N. Y. 255; *Degraw* v. *Erie R. R. Co.*, 49 App. Div. 29; *Dunican* v. *U. Ry. Co.*, 39 App. Div. 497; *McDermott* v. *B. H. R. R. Co.*, 89 App. Div. 214; *Frank* v. *M. S. Ry. Co.*, 58 App. Div. 100; *Lawson* v. *M. St. Ry. Co.*, 40 App. Div. 307; 166 N. Y. 589; *Kennedy* v. *T. A. R. R. Co.*, 31 App. Div. 30; *Legare* v. *U. Ry. Co.*, 61 App. Div. 202; *Hoyt* v. *M. St. Ry. Co.*, 73 App. Div. 249; 175 N. Y. 502; *Green* v. *M. S. Ry. Co.*, 42 App. Div. 160.)

HISCOCK, J. Plaintiff recovered a small verdict for personal injuries sustained through being struck by one of defendant's cars as he was walking across one of its tracks in Fulton street in the borough of Brooklyn.

We think that the evidence showed that he was guilty of contributory negligence as a matter of law, and that the judgment in his favor should be reversed.

Plaintiff was a person of mature age. He walked upon the east side of Hoyt street to Fulton street and there attempted to cross the latter street and defendant's tracks therein. It was about 7:30 in the morning and apparently broad daylight. When he got to the curb upon the near side of Fulton street he looked and saw approaching at a distance of not to exceed fifty feet the car which afterward struck him. This car was proceeding at a rate of five or six miles an hour as described by the only witness who spoke definitely upon this subject. It was in the neighborhood of fourteen feet from this curb from which plaintiff saw the car to the nearest rail of the track upon which he was struck. According to his version there was nothing whatever to obstruct his view of the approaching car. Defendant's motorman asserted that there was a wagon which obscured his view of plaintiff, but the latter distinctly and expressly repudiated this statement. There was nothing except the ordinary traffic in the street which could distract his attention, nor was there any claim upon his part that anything did distract it.

He was struck by the nearest forward corner of the car, but he seeks to mitigate the inference that he fairly walked into the car by the assertion that when he had reached the middle of the track and saw the car upon him he stepped back a step.

From the time plaintiff left the curb to the instant of the collision he never looked at or in the direction of the approaching car, or by any other method so far as appears took the slightest pains to ascertain where it was until a shout called his attention to it and looking up he saw it upon him.

Without any lengthy discussion of the principles applicable to these facts, we think it is clear that the plaintiff did not exercise ordinary prudence. The mere statement of his conduct impresses the mind at once that in utter disregard of all

precautions he placed himself in front of defendant's car. The car had only a comparatively few feet to go to cross the line of plaintiff's course when the latter left the curb. When he saw it, it was proceeding at a considerably more rapid pace than he was. By the time he had proceeded from the curb to the track the car had so covered its distance that it was practically upon him as he stepped upon the track. If he had exercised the slightest heed by either looking or listening he would have detected its presence in such close proximity as to disclose at once the foolhardiness of stepping upon the track in front of it. Nothing but utter oblivion of his surroundings and of his obligations could mislead a traveler into the conduct displayed by plaintiff. It is true that the defendant's employees were under the obligation to manage the car with care and prudence, but this obligation of care was not confined to them. It also rested upon the plaintiff, and their negligence, if they were guilty of it, did not relieve him from the consequences of his own fault.

We are fully mindful of the proposition urged by plaintiff that ordinarily the question of contributory negligence is one of fact for the jury. But, of course, there are limits to this rule and a party may create a controlling presumption of law that he has been deficient in ordinary caution. The plaintiff in this case seems to have reached such limit and to have created such presumption.

Many cases have been called to our attention by the learned counsel for the plaintiff as sustaining the latter's right to recover. We have not failed to examine any of them, but without reviewing them in detail we think it fairly may be said that in each case there were special circumstances which distinguished it from the one at bar and prevents it from being an authority for the judgment appealed from.

We think the facts now presented come rather within the application of the rules adopted as forbidding a recovery in the cases of *Greene* v. *Metr. Street Ry. Co.* (100 App. Div. 303); *Thompson* v. *Metr. Street Ry. Co.* (89 App. Div. 10); *Lynch* v. *Third Ave. R. R. Co.* (88 App. Div. 604); *Weiss*

v. *Metr. Street Ry. Co.* (33 App. Div. 221); *Pinder* v. *Brooklyn Heights R. R. Co.* (173 N. Y. 519).

The judgment should be reversed and a new trial granted, with costs to abide event.

CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ., concur.

Judgment reversed, etc.

MORRIS JACOBSON et al., Appellants, *v.* BROOKLYN LUMBER COMPANY et al., Respondents.

1. APPEAL — UNANIMOUS AFFIRMANCE — COURT OF APPEALS WILL EXAMINE PLEADINGS TO ASCERTAIN WHAT FACTS ARE ADMITTED. An exception to the rule that the unanimous affirmance of a judgment by the Appellate Division precludes the Court of Appeals from looking into the record for facts not contained in the findings is not warranted by the fact that the plaintiffs, in an action decided before the re-enactment of section 1023 of the Code of Civil Procedure, did not have an opportunity to obtain at Special Term a ruling upon additional facts which they deemed established by the evidence. It is only the evidence and the proceedings on the trial, however, that the court will not examine to ascertain whether there are facts not found which rest on undisputed evidence or facts found which are unsupported by any evidence. The pleadings being part of the judgment roll and there being no constitutional prohibition of an examination thereof to ascertain what facts are admitted nor any statutory requirement that the findings shall include such facts, they may and should be read by the court, in connection with a decision upon the issues, to ascertain whether the facts admitted and found sustain the judgment.

2. STOCKHOLDERS' ACTION — WHEN DEMAND THAT CORPORATION BRING ACTION UNNECESSARY. Where in a stockholders' action the defendants against whom the wrong is charged are the executive officers of the corporation, who also constitute a majority of the acting board of directors, a prior demand upon the corporation to bring the action is unnecessary.

3. CORPORATIONS — ACTION OF BOARD OF DIRECTORS VOIDABLE WHERE MAJORITY OF BOARD ARE PERSONALLY INTERESTED — PROSPERITY OF CORPORATION NO DEFENSE. In an action brought by minority stockholders of a corporation to recover for the corporation from the president and vice-president and treasurer thereof amounts received by such officers by reason of increases in their salaries alleged to have been

improperly authorized by the board of directors, and to cancel alleged improper resolutions of said board purporting to authorize such officers to credit themselves with certain amounts for deferred salaries, admissions in the pleadings and findings of fact to the effect that the said officers had since the organization of the corporation been the owners of a majority of the stock; that at the time of and previous to the alleged improper actions by the board of directors they were members thereof and constituted a majority of the membership of said board, the plaintiffs having no representation therein; that the increases in the salaries of said officers were voted by themselves, but that such increases were legitimate and commensurate with the increase in business and resulting profits, they having devoted all of their time to the business, extended it and placed the corporation on a sound basis, and that through their efforts the stock held by the plaintiffs had increased in value, do not justify the conclusion of law that the complaint should be dismissed; since the relation of said officers to the corporation was fiduciary and they could not make an agreement with themselves acting on the one part individually and for their own benefit and on the other part in their fiduciary capacity; and if, through their acts, a loss has been wrongfully occasioned to the corporation, it is neither a defense nor a mitigating circumstance that despite their illegal acts the corporation is still solvent or that its stock has increased in value.

Jacobson v. *Brooklyn Lumber Co.*, 101 App. Div. 609, reversed.

(Argued February 8, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 3, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph M. Gazzam, Jr., for appellants. The facts alleged in the complaint and admitted by the answer and the facts expressly found by the trial court are before the Court of Appeals, and this court has the power to review all questions of law arising upon the facts so admitted in the pleadings, taken in connection with the facts so found. If, upon the facts admitted in the pleadings and the facts found, the plaintiffs were entitled to any relief, it was error to dismiss the

complaint. (*Hilton* v. *Ernst*, 161 N. Y. 227; *Rodgers* v. *Clement*, 162 N. Y. 422; *Fleischmann* v. *Stern*, 90 N. Y. 110; *Paige* v. *Willett*, 38 N. Y. 28; *White* v. *Smith*, 46 N. Y. 418; *Pennachio* v. *Greco*, 107 App. Div. 227; *Bridge* v. *Payson*, 5 Sandf. 210; *Ballou* v. *Parsons*, 11 Hun, 602; *Simms* v. *Wallace*, 46 Hun, 172; *Eaton* v. *Wells*, 82 N. Y. 576.) At the time the decision of the trial court was filed, the Code required the long form of decision, but did not provide for requests to find. Therefore, this court should consider all facts established by uncontroverted evidence, and no presumption should be indulged in that facts favorable to respondents were found which do not appear upon the face of the decision. (*Lazarus* v. *M. E. Ry. Co.*, 145 N. Y. 581; *Zorkowski* v. *Astor*, 13 Misc. Rep. 507; *M. M. & C. Co.* v. *Tietjen*, 34 Civ. Pro. Rep. 29; *Hilton* v. *Ernst*, 161 N. Y. 227; *R. L. Co.* v. *S. & P. P. Co.*, 135 N. Y. 209.) The plaintiffs upon the facts admitted in the pleadings and the facts found by the trial court are entitled as matter of law to judgment setting aside the "resolutions" awarding increases of salaries to the defendants Verity and Robertson, canceling their claims for salaries thereunder and directing the said individual defendants to account for and repay to the company all moneys received by them for these increases in salaries which the trial court expressly found that they "voted themselves." (*Butts* v. *Wood*, 37 N. Y. 317; *Munson* v. *S. R. R. Co.*, 103 N. Y. 59; *Rodgers* v. *Clement*, 162 N. Y. 422; *Armstrong* v. *Dubois*, 90 N. Y. 95; *Beers* v. *N. Y. L. Ins. Co.*, 66 Hun, 75; *Ashley* v. *Kinnan*, 2 N. Y. Supp. 574; *Filon* v. *M. B. Co.*, 15 N. Y. Supp. 57; *Keller* v. *Frost*, 22 Barb. 400; *People's Bank* v. *S. A. Church*, 109 N. Y. 512; *Columbia Bank* v. *Gospel Church*, 127 N. Y. 361.) A director of a corporation is incompetent to act upon the auditing of his own claim for compensation, and if such claim be allowed at a meeting at which his presence is necessary to constitute a quorum, any stockholder may sue on behalf of himself and the other stockholders to avoid the transaction and compel a re-payment of the money. (*Butts* v. *Wood*, 37

N. Y. 317; *Sage* v. *Culver*, 147 N. Y. 247; *A. H. G. M. Co.* v. *Andrews*, 120 N. Y. 58; *Copeland* v. *J. Mfg. Co.*, 47 Hun, 236; *E. N. Y. R. R. Co.* v. *Elmore*, 5 Hun, 214; *Coleman* v. *S. A. R. R. Co.*, 38 N. Y. 204; *Blatchford* v. *Ross*, 54 Barb. 48; *Palmer* v. *C. H. Cemetery*, 122 N. Y. 435; *Brinkerhoff* v. *Bostwick*, 88 N. Y. 59; *Barnes* v. *Brown*, 80 N. Y. 535; *Jones* v. *Morrison*, 31 Minn. 148.) The facts that the plaintiffs have failed to show loss or damage, that their property has increased in value, and that the value of their stock has increased so that it is worth more than par are immaterial. (*Kavanaugh* v. *C. T. Co.*, 181 N. Y. 121.) Plaintiffs are not barred by laches or acquiescence from questioning the acts of the defendants complained of in this action. (*Platt* v. *Platt*, 58 N. Y. 646; *Galway* v. *M. E. R. Co.*, 128 N. Y. 155; *Cox* v. *Stokes*, 156 N. Y. 511; *C. C. Co.* v. *Sherman*, 30 Barb. 577; *H. S. C. Co.* v. *C. C. Co.*, 16 Md. 456.)

George C. Case for respondents. All acts performed and resolutions passed by the three directors, constituting the board of directors since November 7, 1892, are valid and bind the plaintiffs. (*Wallace* v. *Walsh*, 125 N. Y. 26; *D. E. L. Co.* v. *P. Co.*, 160 N. Y. 502.) Plaintiffs' cause of action is barred by laches or acquiescence. (18 Am. & Eng. Ency. of Law [2d ed.], 97; *Platt* v. *Platt*, 56 N. Y. 646.) In actions by stockholders, which assail the acts of directors or trustees, courts will not interfere unless it be made to appear that they have illegally or unconsciously used their powers, or that their acts were fraudulent or collusive and destructive of the rights of the stockholders. (*Leslie* v. *Lorillard*, 110 N. Y. 532.)

CHASE, J. The plaintiffs are minority stockholders of the defendant corporation. This action is brought by them on behalf of themselves and all other stockholders similarly situated to recover for the corporation from the individual defendants the amounts received by them for salaries as offi-

cers of the corporation from the year 1892, and to cancel any and all alleged resolutions on the books of the corporation purporting to authorize said individual defendants to credit themselves with certain amounts for accumulated or deferred salaries, and also to redress other alleged wrongs to the corporation.

The issues were tried at Special Term and a decision was rendered stating separately certain findings of fact and conclusions of law upon which judgment was entered dismissing the complaint of the plaintiffs. An appeal was taken from said judgment to the Appellate Division where the judgment was unanimously affirmed, and from the judgment of affirmance an appeal is taken to this court.

The findings of fact contained in said decision are disconnected and not sufficiently complete to present fully the appellants' contention, and plaintiffs insist that notwithstanding the unanimous decision of the Appellate Division, this court should consider not only the facts as found in the decision, but also the facts which are admitted by the pleadings and the facts established on the trial by uncontroverted evidence. This action was decided after September 1st, 1903, when the last amendment to section 1022 of the Code of Civil Procedure (Chapter 85, Laws of 1903) took effect, but before the re-enactment of section 1023 of the Code of Civil Procedure (Chapter 491, Laws of 1904).

The plaintiffs claim to be at some disadvantage because they did not have an opportunity to present to the court at Special Term a statement of the facts which they deemed established by the evidence and the rulings on questions of law which they desired the court to make, and they urge that there are, therefore, special reasons in this case why the court should examine the evidence to see whether there are facts not found in the decision but which were established by uncontroverted evidence.

It is provided by section 9 of article 6 of the Constitution of the state of New York as follows: "After the last day of December, one thousand eight hundred and ninety-five, the

jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court shall be reviewed by the Court of Appeals. * * *" (Section 191, Code of Civil Procedure.)

This court in *Hilton* v. *Ernst* (161 N. Y. 226) say: "The facts as found are absolutely conclusive here. The appellants can neither add to them nor take from them by urging that, as a question of law, there are facts not found which rest on undisputed evidence, and facts found which are unsupported by any evidence." The court was then considering a case where a judgment had been entered upon a report of a referee, which stated separately his findings of fact and conclusions of law, and in which the judgment so entered had been unanimously affirmed in the Appellate Division.

In *Sweet* v. *Henry* (175 N. Y. 268) the court say: "This court is confined to the findings of fact and is not permitted to look into the record for additional facts." (See, also, *Rodgers* v. *Clement*, 162 N. Y. 422, and *National Harrow Co.* v. *Bement & Sons*, 163 N. Y. 505.)

The reasons why the court will not look into the record for additional facts have been heretofore fully stated, and such reasons do not permit of any exception to the rule by reason of the fact that the plaintiffs have not had an opportunity to obtain at Special Term a ruling upon additional facts which they deemed established by the evidence. The evidence, therefore, cannot be examined for the purpose of ascertaining whether there are facts established by uncontroverted evidence not included in the findings contained in the decision.

The Constitution does not in terms or otherwise prohibit an examination of the *pleadings* to ascertain what facts are admitted thereby. It is provided by section 522 of the Code of Civil Procedure that "Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the

reply, where a reply is required, must, *for the purposes of the action*, be taken as true."

The decision of the court or the report of a referee is required "Upon the trial of the whole *issues of fact*." (Code of Civil Procedure, section 1022.) It is commendable practice for the purpose of preserving a continuity of statement to include in the findings of fact a complete story of the transaction so far as the same is material and can be given from the facts admitted in the pleadings or determined upon the trial of the whole issues of fact, but the statutes do not require findings of fact except upon the issues tried.

It was held by this court in *Wiltsie* v. *Eaddie* (4 Abb. [N. S.] 393) that an exception does not lie to the report of a referee upon the ground that he has refused to find upon a question of fact other than one arising from the issues in the cause. Upon the facts alleged in the complaint which have not been controverted by the answer there is no issue. Findings are not necessary as to such facts in the determination of the issue. (*Bram* v. *Bram*, 34 Hun, 487.)

In *Eaton* v. *Wells* (82 N. Y. 576) this court, in considering an action brought for the foreclosure of a mortgage, say: "There was no need of proof of the amount of the debt aside from the averments of the pleadings. There was then no trial of an issue of fact. No findings of fact were needed for there were no facts to be fonnd. The pleadings contained them."

When a complaint is dismissed before the introduction of testimony it is a determination that the complaint does not state facts sufficient to constitute a cause of action, and in such case findings are not required. Neither does a case where judgment is rendered on the pleadings. (*Wood* v. *Lary*, 124 N. Y. 83.)

It would seem, therefore, that there is no statutory provision requiring that findings be made by a court or referee to include the facts admitted by the pleadings. The pleadings are a part of the judgment roll, and the admissions therein can always be read in connection with the decision of the

court or the report of the referee upon the issues, and they should be so read by this court to ascertain whether the facts so admitted and found sustain the judgment. This court has substantially so held in *Rodgers* v. *Clement* (*supra*), and we find no expression of the court that must necessarily be considered to the contrary. It is the *evidence* and the *proceedings on the trial* that the court will not examine to ascertain whether there are facts not found which rest on undisputed evidence or facts found which are unsupported by any evidence.

It is admitted by the pleadings that the defendant corporation was organized October 29th, 1891; that the defendant Verity has at all times been its president and the defendant Robertson its vice-president; that since December 1st, 1894, said Robertson has also been its treasurer; that said defendants Verity and Robertson have ever since the organization of the company been the owners of a majority of its stock and members of its board of directors; that there were originally five stockholders, all of whom were made directors of the company for the first year; that the plaintiff Arthur C. Jacobson was elected the first secretary and treasurer thereof; that the capital stock of the corporation is $50,000, and $44,400 thereof has been issued; that the stock is now all owned by the two plaintiffs and the two individual defendants except five shares which are owned by a brother of the defendant Robertson; that on the 27th day of October, 1892, at a special meeting of the board of directors, a resolution was adopted removing the defendant Arthur C. Jacobson from his office as secretary and treasurer; that on the 7th day of November, 1892, a resolution was passed at a stockholders' meeting reducing the number of directors from five to three, and thereafter from year to year three persons were elected directors of the company; that since 1894 the brother of said defendant Robertson has been annually elected a director with said defendants Verity and Robertson; that during the first year after the organization of the corporation the board of directors paid to the president, vice-president and treas-

urer each a salary of $2,500; that for each of the years 1893 and 1894 the defendant Verity as president was paid $3,500, and the defendant Robertson as vice-president $2,500; that for the year 1895 the defendant Verity as president was paid $3,500, and the defendant Robertson as vice-president and treasurer $3,500; that for each of the years 1896 to 1898, inclusive, the defendant Verity as president was paid $5,000, and the defendant Robertson as vice-president and treasurer was paid $5,000; that in the fall of 1898 and during each year thereafter until the commencement of this action a resolution was entered in the minutes of the directors that the defendant Verity be paid a yearly salary of $8,000, and the defendant Robertson as vice-president and treasurer a yearly salary of $8,000, but such resolution further provided that each of said officers should draw on account of his salary but $5,000 each year and that the balance of the salary, namely, $3,000, should be allowed to "accumulate until such time as the company could, in the judgment of the directors, afford to have it withdrawn from the business;" that a statement of the assets and liabilities of the corporation was furnished by the treasurer on January 22, 1903, which shows a credit to the defendant Robertson of $35,992.49, and to the defendant Verity of $32,097.59; that said credits to the individual defendants amounted to more than fifty per cent of the total assets of the corporation at that time.

The court, among others, found the following as facts:

"VIII:— Defendants Verity and Robertson have been officers and directors of the company from its organization. They have devoted all their time to the business of the corporation, they have extended its business, placed it on a sound basis and through their efforts the stock, part of which is held by the plaintiff, has been rendered valuable, so that it is conceded to be worth considerably more than par. The company is now in a prosperous condition as a result of their management and there are undivided profits in the treasury.

"IX:— Defendants Verity and Robertson have voted themselves increase in salary. The increases in salary are legiti-

mate and commensurate with the increase in business and resulting profit.

"XIV: — Plaintiffs had the right to inspect the books and to be present and vote at stockholders' meetings. They have made no effort to assert their alleged rights either in the meetings of directors or stockholders.

"They stood aloof unfriendly — critical for ten years and resort to a court of equity.

"XV: — Plaintiffs' property has advanced in value so that it is worth double what it was at the outset. They have failed to show loss or damage."

As a conclusion of law it found that defendants are entitled to judgment dismissing the complaint on the merits.

A demand upon the defendant corporation to bring this action was unnecessary as the individual defendants against whom the wrong is charged are the executive officers of the corporation and they also constitute a majority of the acting board of directors thereof. (*Hanna* v. *Lyon*, 179 N. Y. 107; *Niles* v. *N. Y. C. & H. R. R. R. Co.*, 176 N. Y. 124; *Sage* v. *Culver*, 147 N. Y. 241; Helliwell on Stock and Stockholders, section 405.) If the individual defendants have illegally and wrongfully occasioned a loss to the defendant corporation it is neither a defense nor a mitigating circumstance that despite such illegal and wrongful acts the corporation is still solvent, or that the stock has increased in value during the time when the alleged illegal and wrongful acts have been committed. (*Kavanaugh* v. *Commonwealth Trust Co.*, 181 N. Y. 121.)

Neither the good faith, honesty nor legality of the acts of officers of a corporation can be determined by ascertaining whether the market value of the capital stock of the corporation has increased or diminished during the time when said acts were performed. A corporation may lose money notwithstanding good, faithful, honest endeavor by its officers, and it may increase its assets notwithstanding selfish and illegal acts by them. The results of transactions are considered in determining the value of services performed for which a person or corporation is liable, but the value cannot be determined by

any rule of proportion, nor can the amount to be paid therefor be intentionally so gauged as to absorb substantially all the profits of a corporation that have accrued or that the corporation may at some future time be able to pay and have withdrawn from the business.

The trial court has not found that the defendant corporation ever promised to pay the defendants the salaries stated or that the defendants ever rendered services of a value equal to the amount of such salaries. The finding in substance is that the defendants helped themselves to the several amounts received by them and credited themselves with said amounts now appearing on the books of the corporation, the exact language of the finding being "Defendants Verity and Robertson have voted *themselves* increase in salary." The findings which it is claimed justify their acts in so taking and crediting to themselves increased salaries are in substance that the net assets of the corporation have not been depleted but increased, and that the salaries are legitimate and commensurate with the increased business and resulting profit.

The relation of an officer of a corporation to it is fiduciary, and he must at all times act in good faith and unselfishly towards the corporation. The relation is such that an officer of a corporation cannot make an agreement with himself acting on the one part individually and for his own benefit, and on the other part in his fiduciary capacity as an officer of the corporation.

It is said in 10 Am. & Eng. Cyc. of Law, 790: "A director cannot with propriety vote in the board of directors upon a matter affecting his own private interest any more than a judge can sit in his own case, and any resolution passed at a meeting of the directors at which a director having a personal interest in the matter voted will be voidable at the instance of the corporation, or the shareholders, without regard to its fairness, provided the vote of such director was necessary to the result."

The courts in this state have frequently asserted the voidability of acts and votes of corporate officers when they are

affected by private interests. (*Butts* v. *Wood*, 37 N. Y. 317; *Kelsey* v. *Sargent*, 40 Hun, 150; *Copeland* v. *Johnson Mfg. Co.*, 47 Hun, 235; *Barnes* v. *Brown*, 80 N. Y. 527; *Ziegler* v. *Hoagland*, 52 Hun, 385; *Beers* v. *N. Y. Life Ins. Co.*, 66 Hun, 75; *Duncomb* v. *N. Y., H. & N. R. R. Co.*, 84 N. Y. 190; *Burden* v. *Burden*, 8 App. Div. 160; *Munson* v. *Syracuse, G. & C. R. R. Co.*, 103 N. Y. 58; *Sage* v. *Culver*, 147 N. Y. 241; *Marshall* v. *Industrial Federation of America*, 14 Anno. Cases, 100. See American & English Ency. of Law [2d ed.], vol. 21, 897–910; Cook on Stock and Stockholders [3d ed.], sec. 657: Taylor on Private Corporations [5th ed.], secs. 646, 647, 648.)

The findings of the court, taken with the admissions in the pleadings, do not justify the conclusion of law that the plaintiffs' complaint should be dismissed.

The facts upon which the question of laches can be considered are not sufficiently before us to require a statement of the opinion of this court in relation thereto, but it seems reasonably clear at least that laches cannot be urged against the plaintiffs as against their right to have considered and determined the question whether the defendants are entitled to the deferred or accumulated salaries credited to them on the books of the corporation.

The judgment of the Appellate Division and of the Special Term should be reversed and a new trial granted, with costs to abide the final award of costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT and VANN, JJ., concur; WILLARD BARTLETT, J., not sitting.

Judgment reversed, etc.

ARTHUR S. LEVY, as Surviving Partner of the Firm of I. K. COHN & Co., Appellant, *v.* THE JAMES MCCREERY REALTY CORPORATION, Respondent.

APPEAL — QUESTION OF FACT. An affirmance by the Appellate Division of a judgment entered upon a verdict dismissing a complaint in an action to recover for services in procuring a tenant for defendant's

property, upon the ground that the defendant was entitled to a dismissal as a matter of law, sustained, there being evidence from which the jury might have found as a matter of fact that the parties had never agreed upon the terms of a lease.

Cohn v. *McCreery Realty Corp.*, 102 App. Div. 611, affirmed.

(Argued February 2, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 6, 1905, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Emanuel J. Myers for appellant. The broker having brought Mr. Shubert and Mr. McCreery together and they having come to an agreement "fixing the terms, number of years, the amount of rent and the security that was to be paid," was entitled to his commissions. (*Gilder* v. *Davis*, 137 N. Y. 504; *Fraser* v. *Wyckoff*, 63 N. Y. 445; *Sibbald* v. *B. Iron Co.*, 83 N. Y. 378; *Duclos* v. *Cunningham*, 102 N. Y. 678; *Martin* v. *Bliss*, 57 Hun, 157, 159; *Sampson* v. *Ottingen*, 93 App. Div. 226; *Sheinhouse* v. *Klueppel*, 80 App. Div. 445; *Lomer* v. *Meeker*, 25 N. Y. 363; *Wilds* v. *R. R. Co.*, 24 N. Y. 433; *Kelly* v. *Burroughs*, 102 N. Y. 93.) When the broker brings the owner "into accord" with the proposed tenant (who accepts the owner's terms), the broker becomes entitled to his commissions, which cannot be defeated because the owner of his own volition and without the proposed tenant's fault, declines to carry out the understanding. (*Gilder* v. *Davies*, 137 N. Y. 504; *Fraser* v. *Wyckoff*, 63 N. Y. 445; *Moses* v. *Bierling*, 31 N. Y. 462; *Sibbald* v. *B. Iron Co.*, 83 N. Y. 378; *Folinsbee* v. *Sawyer*, 8 Misc. Rep. 370; *Levy* v. *Ruff*, 4 Misc. Rep. 180; *McQuillen* v. *Carpenter*, 72 App. Div. 595; *Slater* v. *Holt*, 10 N. Y. S. R. 257; *Barnard* v. *Monnot*, 3 Keyes, 203.)

Eugene G. Kremer for respondent. The minds of the parties never met upon the terms of the lease. (*Sibbald* v. *B.*

Iron Co., 83 N. Y. 378; *Gerding* v. *Haskins*, 141 N. Y. 514; *Donovan* v. *White*, 182 N. Y. 43; *Alden* v. *Earl*, 121 N. Y. 688; *Myers* v. *Dean*, 132 N. Y. 65; *Martin* v. *Bliss*, 57 Hun, 157; *Murray* v. *Beard*, 102 N. Y. 505; *Britton* v. *Ferrin*, 171 N. Y. 235.)

HISCOCK, J. The co-partnership of which the present plaintiff is the surviving member brought an action to recover for services alleged to have been performed in procuring a tenant for defendant's property. The claim was disputed and we think that there was sufficient evidence to sustain the verdict rendered by the jury in favor of defendant upon this issue and that the judgment thereon should be affirmed.

The complaint as originally served amongst other things alleged that plaintiffs "while engaged in business as real estate brokers aforesaid, inquired of the said defendant whether the said defendant desired to rent and lease the premises on the southerly side of Forty-second street in the city of New York * * * for theatrical purposes, and upon receiving assent thereto entered into negotiations with divers persons. * * * That thereafter and on or about the 3rd day of October, 1901, the said plaintiffs procured and obtained tenants for the said defendant's premises. * * * That in consideration of such services and the procuring of such tenants the said defendant promised and agreed to pay to the said plaintiffs the sum of Three thousand dollars ($3,000) as compensation for their services."

The evidence introduced in behalf of the plaintiff tended to establish certain negotiations between the parties hereto and other people for the leasing by the latter of only a portion of the premises owned by defendant and referred to in the complaint. This evidence covering only a portion of the premises was regarded by plaintiff as so at variance with the allegations of the original complaint which apparently set forth a contract predicated upon a leasing of the entire premises, that at the close of the case permission was asked to have the complaint amended to conform to the proofs. This request was fol-

lowed by a discussion between the court and the counsel upon the respective sides as to the identity of the portion of the premises for the leasing of which plaintiff was to secure his commissions. This discussion as contained in the record does not very clearly or intelligibly distinguish and bound that portion of the premises which supplies the ground work for plaintiff's claim. Finally the court assumed and stated that the premises involved were correctly shown and described upon a diagram in evidence as Exhibit 8. And thereafter the entire situation was cleared up and the issue between the parties definitely stated and formulated by the court as a claim by the plaintiff "that the defendant employed him to find a tenant for the premises shown on the diagram, Exhibit 8, mentioning practically the metes and bounds. That is a short statement of it, and he says that he did get a tenant for such a piece of property, and you (the defendant) deny that he did so get a tenant, and the real question at issue is did the minds of the defendant and the Shuberts meet upon that piece of property mentioned and described here."

No objection was taken to this statement and summary of the dispute between the parties, and the court thereupon proceeded to submit the case to the jury in accordance with the statement thus made.

We call attention thus specifically and somewhat at length to what took place at the close of the case, because outside of this, considerable vagueness and indefiniteness characterized the proofs and the contentions of the parties. The amendment and statement of the issues as allowed and made by the court and accepted by the litigants, furnishes a very definite and simple test by which to review the trial and proceedings which are now criticised by the plaintiff. The specific question was whether plaintiff's firm brought defendant and a firm of theatrical managers known as Shubert Brothers to an agreement for a lease of the premises described in Exhibit 8.

The learned Appellate Division in effect held that defendant was entitled to a dismissal of the complaint as a matter of law because there was no evidence to sustain the proposition

that plaintiff had procured a tenant of the premises who was acceptable to the defendant; that as a matter of law the Shuberts and the defendant never agreed upon the terms of a lease, and, therefore, plaintiff never earned his commissions.

We do not think that it is necessary to go to this extent in order to affirm the judgment which has been rendered against plaintiff. We think, however, that there certainly was evidence from which a jury might find as a matter of fact that the parties had never agreed upon the terms of a lease, and if this is so, it is our duty to affirm the judgment.

The testimony of the defendant's witnesses is to the effect that while upon October 3, 1901, defendant and the proposed tenants had agreed upon the details of the lease which the latter were ready to execute, the underlying question still remained to be determined by the defendant whether it would or would not rent the premises upon these terms and that subsequently it decided this question in the negative. Isolated expressions may be picked out from the testimony which would bear a different construction, but, taken as a whole, the evidence presented the view stated for the consideration of the jury which adopted it.

Various errors are alleged in connection with the charge of the learned trial justice, but we think that none of these requires a reversal. The issue as framed by him and accepted by the parties was fairly and intelligibly submitted to the jury. While the numerous requests upon the part of plaintiff's counsel for instructions and the somewhat extended colloquies which took place between the court and the jury at times resulted in some confusion of expression, we do not think that this was sufficient to materially obscure the substantial and simple issue which was submitted for the verdict of the jury.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ., concur.

Judgment affirmed.

CHARLES H. VROOM, Respondent, v. JOHN TILLY et al., Appellants.

1. OYSTERS — ACT RELATING TO CULTIVATION OF SHELL-FISH (L. 1887, CH. 584) — CONDITIONS OF GRANT PRECEDENT, NOT SUBSEQUENT. The grantee of a perpetual franchise in oyster grounds pursuant to chapter 584 of the Laws of 1887 acquires the exclusive right to the oysters planted thereon only when he performs and continues to perform the statutory conditions of the grant: 1. He must mark out the land proposed to be used and must continue to keep it so marked. 2. He must actually plant or cultivate oysters thereon. These conditions are not subsequent so as to require affirmative action by the state to enforce a forfeiture in case of non-performance, but are precedent, and in such a case the franchise reverts and the rights of the grantee cease.

2. TITLE TO OYSTERS PLANTED ON LAND UNDER WATER GRANTED FOR THAT PURPOSE TO ANOTHER PARTY. One who in good faith plants oysters on land under water, without knowledge that it has been granted to another for the purpose of cultivating shell-fish thereon, and protects them by the marks recognized by the common law, acquires an exclusive title to the oysters and may maintain an action for their conversion, where the grantee, although designating the boundaries of the grant by buoys at the time it was made, as required by the statute, fails thereafter to maintain them or to cultivate oysters thereon.

Vroom v. *Tilly*, 99 App. Div. 516, affirmed.

(Argued February 6, 1906; decided March 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 28, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edwin Countryman and *Henry J. McCormick* for appellants. The common-law rule relating to the rights of an individual planting and cultivating oysters in the tide waters of a bay or arm of the sea where grants of franchises have been made to particular individuals for the exclusive use of certain lands under water, is no longer in force. (*Post* v. *Kreischer*, 103 N. Y. 110; *People* v. *Hazen*, 121 N. Y.

314; *Spencer* v. *Myers*, 150 N. Y. 269; *Matter of N. Y. & H. R. Co.* v. *Kip*, 46 N. Y. 546; *Mead* v. *Stratton*, 87 N. Y. 493; *Baum* v. *Mullen*, 47 N. Y. 577; *Brooks* v. *Schwerin*, 54 N. Y. 344; *Nicoll* v. *N. Y. & E. R. Co.*, 12 N. Y. 121; *Towle* v. *Remsen*, 70 N. Y. 303; *Uppington* v. *Corrigan*, 151 N. Y. 144; *Vail* v. *L. I. R. R. Co.*, 108 N. Y. 283.) If the oysters grown upon the forty acres of land in question of the Nicholas P. Housman tract be regarded as ordinary personal property, the title to the oysters was in the defendants, and they had a right to appropriate them to their own use. (*State* v. *Taylor*, 27 N. J. L. 117; *Fleet* v. *Hegeman*, 14 Wend. 42; *Stahl* v. *Wilbur*, 77 N. Y. 158; *Sherman* v. *Willett*, 42 N. Y. 146; *Sexton* v. *Bruse*, 135 N. Y. 387; *Le Barran* v. *Babcock*, 122 N. Y. 153; *De Mott* v. *Hageman*, 8 Cow. 220; *Lane* v. *King*, 8 Wend. 584; *Shepard* v. *Filbrick*, 2 Den. 174; *Rich* v. *Baker*, 3 Den. 79.) If the oysters in question grown upon the Nicholas P. Housman tract be regarded as *feræ naturæ*, the title to them as personal property was in the defendants, and they had a right to appropriate them to their own use. (*Blades* v. *Higgs*, 11 H. L. Cas. 621; *Gillett* v. *Mason*, 7 Johns. 16; *Ferguson* v. *Miller*, 1 Cow. 243; *Goff* v. *Kilts*, 15 Wend. 550; *Merrills* v. *Goodwin*, 1 Root, 209; *Rexworth* v. *Coon*, 15 R. I. 35; *Sterling* v. *Jackson*, 69 Mich. 489; *Decker* v. *Fisher*, 4 Barb. 592; *Brinkerhoff* v. *Starkins*, 11 Barb. 248; *Lowndes* v. *Dickerson*, 34 Barb. 586.) The fact that the plaintiff and his assignors believed that the tract buoyed out by them included the lands in question, and that they first learned that said lands were in the Nicholas P. Housman tract and not in the Merrill tract in June, 1902, did not change the legal effect of their acts nor relieve them from the wrongful character imposed upon their acts by law. (*Parker* v. *Euston*, 102 Ill. 272; *People* v. *Martell*, 138 N. Y. 595; *Spaulding* v. *Lowe*, 56 Mich. 367; *I. S. M. Co.* v. *Reynolds*, 124 U. S. 374; *Curtis* v. *Albee*, 167 N. Y. 360; *I. R. M. Co.* v. *Hurtin*, 37 Mich. 332; *Gates* v. *R. B. Co.*, 70 Mich. 309; *Dyke* v. *Nat. Transit Co.*, 22 App. Div.

360; *Pierpont* v. *S. & M. L. Co.*, 11 App. Div. 383; *Hoffman* v. *Carow*, 22 Wend. 285.)

S. Le Roy Ackerly for respondent. The law, applied to the facts found by the trial court, justifies a recovery by the plaintiff. (*Davis* v. *Davis*, 72 App. Div. 593.) Under the facts of this case the rights of the parties should be determined by the common law regulating private ownership in shell-fish. (*McCarthy* v. *Holman*, 22 Hun, 53; *Grace* v. *Willetts*, 50 N. J. L. 414.) Defendants had no right to confiscate or appropriate the oysters in dispute. (*Sutter* v. *Vanderveer*, 47 Hun, 366; *McCarthy* v. *Holman*, 22 Hun, 53; *Grace* v. *Willetts*, 50 N. J. L. 414.)

HAIGHT, J. It appears from the findings of the trial court that in the month of December, 1891, the state of New York, through its commissioner of fisheries, granted to one Nicholas P. Housman a franchise in a tract of land under the waters of Long Island Sound near Crane's Neck in the county of Suffolk, consisting of two hundred and forty acres, pursuant to the provisions of chapter 584 of the Laws of 1887, for the purpose of the cultivation of shell-fish; that the plaintiff was engaged in the cultivation of oysters upon an adjoining tract in which a similar franchise had been granted to one John H. Post, and had acquired the right to cultivate oysters upon another tract also adjoining, in which a grant had been made to one Elizabeth V. Merrill; that in the summer of 1896 the plaintiff in good faith believing that he was upon lands included in the franchise to Merrill, proceeded to buoy, dredge out, plant and cultivate oysters on a tract of land consisting of about forty acres, and from that time on maintained the buoys surrounding such lot, caught the sea stars therefrom and cared for the growing oysters; that the soil upon which such cultivation was had proved available for the purpose, resulting in a large production; that about the first of June, 1902, the defendants, who had acquired the rights of Nicholas P. Housman in his franchise, caused a survey to be made, which

showed that the forty-acre tract upon which the plaintiff had planted and cultivated oysters was included in the Housman franchise, and thereupon they entered upon such premises and took and carried away the oysters and converted them to their own use.

There was evidence tending to show that at the time Housman obtained his franchise the land was surveyed and buoys set upon each corner, which consisted of a stake tied by a rope to a stone, and that such buoys would last about a year. It was, however, found as a fact that when the plaintiff began to work the tract it was not marked by buoys, and it is not claimed that Housman or his assigns have cultivated any part thereof for oysters or gathered any therefrom until the taking in 1902 of those claimed by the plaintiff. The trial judge found that the oysters belonged to the plaintiff, and the judgment entered upon his decision has been affirmed in the Appellate Division.

I do not think that the rights secured by the plaintiff to plant and cultivate oysters upon the franchise of Post or Merrill adds to or affects his claim. His rights were those only given to every citizen to go out into the sea and fish or plant and gather oysters. Those rights have been defined by ANDREWS, J., in the case of *Post* v. *Kreischer* (103 N. Y. 110) as follows: "By the common law oysters planted in a bed clearly marked out and defined in the tidewater of a bay or arm of the sea, which is a common fishery to all the inhabitants of the state where the bay or arm of the sea is situated, where there are no oysters growing spontaneously at the time, are the property of the person who planted them, and the taking them by another person is a trespass for which an action lies. (*Fleet* v. *Hegeman*, 14 Wend. 42; *Decker* v. *Fisher*, 4 Barb. 592; *Lowndes* v. *Dickerson*, 34 id. 586, 589.) The planting of oysters in tidewaters and the right of property in the person planting them is not regarded as an exclusive appropriation of the right of fishery common to all the inhabitants of the state but as a legitimate exercise of the common right not inconsistent with its reasonable enjoyment by others."

It will be observed that the bed must be "clearly marked out," that is, buoyed or staked out, and this must be continued evidently for the purpose of notifying or warning others who are lawfully fishing or gathering oysters upon the sea, of the private ownership of the oysters in the bed so "marked out." It is, therefore, apparent that the oysters planted and cultivated by the plaintiff upon the tract in question became his personal property unless he has been deprived of his right thereto by the statute alluded to and the grant of the franchise thereunder to Housman. Under the statute the commissioners of fisheries are required to make a survey of the lands under the waters of the state suitable for use for the planting and cultivation of shell-fish and to make a map thereof. They are also required to make a survey of all the beds of oysters of natural growth and to set them apart for preservation, and they are directed not to include them in any of the franchises granted. They are then empowered in the name and behalf of the People of the state "to grant, by written instruments under their hands and seals, perpetual franchises for the purposes of shell-fish cultivation in the lands applied for under the waters of the state, for the consideration of not less than one dollar per acre, if the lands are unoccupied or unused, and not less than twenty-five cents per acre if the lands are in present use and occupation, and the right to use and occupy said grounds for said purposes shall be and remain in the said grantee, his legal representatives or successors forever; provided only that the said grantee, his legal representatives or successors shall *actually use and occupy* the same for the purposes of shell-fish cultivation, and for no other purpose whatever." The statute further provides that "The franchises thus granted shall be deemed to be personal property, and courts of law and of equity shall have power, authority and jurisdiction to determine and enforce the rights of persons, firms or corporations thereto as though such franchises were actually personal property owned and possessed by such persons, firms or corporations, and such franchises may be sold, transferred, assigned or conveyed the same as other per-

sonal property. Immediately after the receipt of the aforesaid instruments of conveyance, the grantee shall at once cause the grounds therein conveyed to be plainly marked out by stakes, buoys or monuments, which stakes, buoys or monuments shall be continued by said grantee, his legal representatives or successors."

The franchise granted to Nicholas P. Housman pursuant to the provisions of this statute recites the application made by him to the commissioners of fisheries for a franchise, in which he represented that he wished and intended to use the grounds for the planting and cultivating of shell-fish; that the grounds designated were not natural oyster beds, and after also reciting the compliance with the rules of the commissioners established with reference to the granting of franchises proceeds to grant to the applicant a perpetual franchise for the purposes of shell-fish cultivation in the lands applied for, specifically describing them by their lot numbers, and then concludes "to have and to hold the same unto the said Grantee and legal representatives and successors forever, provided always that said grants are not natural oyster beds; that this grant shall not interfere with any established right of oyster cultivation and that *said grantee shall at once cause the said grants to be plainly marked by stakes, buoys, ranges or monuments, which stakes, buoys, ranges or monuments shall be continued by the grantee and legal representatives, and provided further that the grantee and holder of said grants shall actually use and occupy the same for the purposes named, in good faith*, and for no other purpose and this grant is accepted by said grantee subject to all the provisions of the act aforesaid * * * *and it is stipulated, conditioned and agreed that if the grantee herein shall cease to actually use and occupy the premises hereby granted for shell-fish cultivation or shall use them for any other purposes whatsoever * * * then this grant shall be void and the lands herein described shall forthwith revert to the State of New York.*"

It is now claimed that the provisions of this statute requiring

that the grantee shall actually use and occupy the same for shell-fish cultivation, and that he shall immediately after the receipt of the franchises at once cause the grants to be plainly marked out by stakes, buoys or monuments, which stakes, buoys or monuments shall be continued, are conditions subsequent, invoking the doctrine that the law abhors a forfeiture, and that such forfeiture could only be adjudged in an action brought by the attorney-general; that the oysters are *feræ naturæ*, and the rule of law pertaining to reducing possession of such animals when found upon the lands of another obtains, and, therefore, the defendants finding oysters upon their premises had the right to reduce them to possession and dispose of them. It appears from the scientific authorities upon the subject that oysters are propagated by the emission from the female oyster of ova which flow in the water and become fertilized by contact with the milt emitted by the male oyster, and from these there are hatched small larvae which swim about for a few days and then settle down to the bottom of the sea and attach to some hard substance, where they remain, and from which oysters grow. I do not deem it necessary to now determine whether they should be regarded as wild or domestic animals, or organisms incapable of locomotion, for it is conceded that they grow in beds having a fixed location, either natural or by planting and cultivation, and either under the common law or the statute those produced through human agency are the personal property of the planter when he has complied with the rules with reference to marking their location. As to whether the provisions of the statute with reference to proceeding to cultivate and mark out shall be regarded as conditions subsequent presents a question of much importance. The statute contains no provision for the recording of the transfers of the franchises. Being personal property it may be transferred from one party to another by mere assignment and it will readily be seen that, after the lapse of years, the state or its officers would, in many cases, be left without means of ascertaining the owners of the franchises against whom a prosecution for forfeit-

ure could be maintained. If this construction of the statute is to be adopted then franchises may be procured of all of the available lands for oyster culture by persons not intending to engage in such business but for the purpose of holding up the culture until the necessities of the public for the food induce the payment to them of a large sum for the right to cultivate. This would not be in accord with public policy, and it should not be adopted unless such was the plain intent of the legislature.

The franchise granted to Housman herein was from the state, through its commissioners of fisheries. The grant, therefore, is not to be construed against the grantor, as in case of a conveyance by one citizen to another, but most favorably to the state, which stands in the place of the crown, where the rule is that only that passes in which the intention of the crown is clearly manifest. (*Duke of Somerset* v. *Fogwell*, 5 Barn. & Cres. 875, 885; *Matter of Mayor, etc., of New York*, 182 N. Y. 361, 365.) What was the legislative intent? Evidently not to do away with or abrogate the common-law right of fishery in the bays or arms of the seas recognized the world over. The planting and cultivation of oysters had become a great and profitable industry, in which many people were engaged. When a suitable piece of ground was discovered for their propagation it often occurred that many persons sought to occupy it. Under the common law each person had the right to stake out his bed and the oysters growing thereon became his property, but heavy storms often carried away the stakes, and this was liable to occur several times a year. The replacing of them so as to correctly mark the bed became a fruitful source of dispute between the owners of abutting beds, often resulting in quarrels and the breach of the peace. It was to end these disputes that the legislature saw fit to pass the statute in question, not in derogation of the common law or the rights of its citizens but in aid thereof, by requiring a survey of lands designed for oyster culture and the granting of a franchise to those desiring to cultivate thereon, to the end that each person cultivating

a bed may have it definitely located by an official survey, so that in case his stakes or buoys should be swept away they could be accurately replaced in accordance with the survey, thus avoiding the disputes that theretofore often occurred. At common law, as we have seen, a person desiring to cultivate oysters was required (1) to stake or mark out the lot that he proposed to occupy for that purpose and to continue to keep it so marked, and (2) he must actually plant or cultivate oysters thereon, and as long as he continued to do this his right to the oysters was protected; but failing to keep his territory marked so that others may know the location of his property or in failing to cultivate or work his bed his exclusive right thereto was no longer enforceable at law and the rights of the public to fish or gather oysters thereon was no longer prevented by the courts. So it is under the statute and the franchise granted thereunder. In order to maintain his franchise he must first cause the same to be plainly marked by stakes, buoys or monuments, which marks shall be continued; and, second, he shall actually use and occupy the same for the cultivation of oysters in good faith. And under his grant he expressly stipulates and agrees that in case he fails to do this his grant "shall be void and the lands herein described shall forthwith revert to the State." So that under the common law the exclusive right of a citizen to a bed of oysters cultivated by him continues so long as he complies with the requirements to which we have called attention and no longer, and this is equally true with reference to the provisions of the statute. The rights of a person procuring a franchise continue so long as he complies with the provisions of the statute and the grant made to him thereunder in the particulars referred to, and no longer.

The grant, as we have seen, is of a right to cultivate shellfish at a place specified in the bays and arms of the seas. It prohibits the occupying of the territory for any other purpose. It does not purport to convey any interest in the land itself. It is only a right to occupy for a specified purpose. It is in the nature of an incorporeal hereditament, as was said by

GRAY, J., in *Moore* v. *Brown* (139 N. Y. 127, 132): "I see no other conclusion possible than that what he obtains from the state is the grant of the mere right or *incorporeal privilege* to take out the mineral found within the lands of the state, and to have as his own only what is so taken out. The act secures to him a right in that respect exclusive as to all the world and of a *duration measured by * * * his compliance with conditions expressed * * *.*" (Washburn on Easements [2d ed.], 495.) In some respects it is analogous to the ordinary oil lease, so called, granted by the owners of lands to persons prospecting for oil. These leases usually grant a right to a person to enter upon the premises and bore for oil, but contain a provision that they shall be null and void at the end of a specified time from date, unless the lessees commence and with due diligence bore a well for oil within that time. It has been uniformly held that the failure of the lessee to enter and diligently prosecute the boring of a well within the time specified operated as a forfeiture. (*Allegany Oil Co.* v. *Bradford Oil Co.*, 21 Hun, 26; affirmed, 86 N. Y. 638; *Shepherd* v. *McCalmont Oil Co.*, 38 Hun, 37; *Eaton* v. *Allegany Gas Co.*, 122 N. Y. 416.)

In this case it appears that the plaintiff, after dredging off the lot in question, covered the same with oyster shells. It appears that oysters are propagated in various ways; one by the planting of seed oysters, so called, which consist of full-grown male and female oysters; and another way is by the planting of oyster shells, which has been found to be quite effective in case they are located within the vicinity of a bed of oysters. The larva or spat, as it is called, floats in the water and attaches to the shell and grows, becoming an oyster. Each of these ways of propagating is recognized, and the oysters growing upon the shells so planted are held to be the personal property of the planter the same as if they had grown from the seed oysters planted. (*Grace* v. *Willets*, 50 N. J. Law, 414.)

We, therefore, conclude that the requirements of the statute with reference to the marking out and occupying the territory

for the cultivation of shell-fish, which were incorporated into the grant to Housman, were conditions which he was required to perform in the ordinary way in which the cultivation of oysters is usually conducted, in order to exclude the public from their common-law right of fishing and gathering oysters upon the bays or arms of the seas which may be covered by his franchise, and he having failed to so perform for a number of years, and the plaintiff, having in good faith located upon the territory and planted a bed of oysters thereon and protected them by the marks recognized by the common law, has acquired a title to such oysters and no person has the right to take them from him.

The judgment should be affirmed, with costs.

VANN, J. (dissenting). Every condition in a grant is either precedent or subsequent, whether it relates to real or personal property. The condition relating to setting out buoys in the grant before us was a condition precedent, upon the performance of which the estate vested, but the condition relating to the maintenance of buoys thereafter was a condition subsequent, because it related to an estate or interest which had already vested. The claim that the condition as to maintenance was continuous is simply an admission that it was a condition subsequent, for whatever is continuous is present and cannot be past or precedent. A condition subsequent does not execute itself. Action was required by the state, as the grantor, by physical re-entry or judicial proceedings. Until then the grantee, by the necessary operation of the grant, was in lawful possession of the plat of land under water for the purpose of raising oysters. No one but himself had the right to use it for that purpose until the state interfered and dispossessed him for breach of the condition subsequent. The plaintiff, therefore, was a trespasser both in entering and cultivating, and the defendant had the right to harvest, although he did not plant, because the land was his for the purpose of the grant as against all but the state. While the equities are with the plaintiff, the law is with the defendant,

and I vote to maintain the law by reversing the judgment appealed from.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT and CHASE, JJ., concur with HAIGHT, J.; VANN, J., reads dissenting opinion; WILLARD BARTLETT, J., not sitting.

Judgment affirmed.

LOUIS ETTLINGER, Respondent, *v.* JONAS WEIL et al., Appellants.

1. MEASURE OF DAMAGES — ACTION TO RECOVER FOR FALSE REPRESENTATIONS MADE TO INDUCE PURCHASE OF REAL PROPERTY. The measure of damages, in an action brought by a purchaser of real property to recover for alleged false representations, as to the rents received from part of the premises, made by the vendors to induce him to purchase the property, is the difference between the market value of the premises if leased according to the representation and their actual market value.

2. SAME — EVIDENCE. As bearing upon such issue, expert evidence is competent to prove the market value of the property, if the part in question had been leased for the rent represented by the defendant, since there is no way to prove the damages sustained by plaintiff except by starting with the fee value of the property if leased according to the representation; but evidence as to the market value, based upon the rent actually received by the vendors for the part in question, is incompetent, where such rent depended, not upon the market value of the whole property, but upon special considerations relating to the part in question, so that such rent cannot be made the standard of the actual value of the entire property.

3. SAME — ERRONEOUS EXCLUSION OF EVIDENCE TENDING TO SHOW THAT FALSE REPRESENTATION CAUSED NO DAMAGE. The exclusion of questions, asked expert witnesses for defendant, regarding the rental value of the part of the premises in question and tending to show that the rental value thereof exceeded or was equal to the representation, constitutes reversible error; since false representations do not warrant the recovery of damages unless they cause pecuniary injury, and a misrepresentation that the premises were leased at a certain rate could result in no damage, if the actual rental value equalled or exceeded that rate.

Ettlinger v. *Weil*, 94 App. Div. 291, reversed.

(Argued February 14, 1906; decided March 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May

17, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alton B. Parker, *Abram I. Elkus* and *Carlisle J. Gleason* for appellants. The trial court was repeatedly in error in the admission and exclusion of evidence as to value and damages. (*Whitney* v. *Allaire*, 1 N. Y. 305; *Haight* v. *Hayt*, 19 N. Y. 464; *Krumm* v. *Beach*, 96 N. Y. 398; *Gould* v. *Cayuga Bank*, 99 N. Y. 333; *Vail* v. *Reynolds*, 118 N. Y. 297; *Yeomans* v. *Bell*, 151 N Y. 230; *King* v. *Mott*, 37 App. Div. 124; *Grosjean* v. *Gallaway*, 64 App. Div. 547; *Prince* v. *Jacobs*, 80 App. Div. 243; *Sigafus* v. *Porter*, 179 U. S. 116.) Errors were committed in the admission and exclusion of evidence of the expert witnesses. (*Dilleber* v. *H. L. Ins. Co.*, 87 N. Y. 79; *People* v. *Augsbury*, 97 N. Y. 501; *Werner* v. *Brooklyn El. R. R. Co.*, 11 App. Div. 86; *Matter of Koch*, 33 Misc. Rep. 153; *Morehouse* v. *Matthew*, 2 N. Y. 514; *Van Deusen* v. *Young*, 29 N. Y. 9; *Marcly* v. *Shults*, 29 N. Y. 346; *Green* v. *Plank*, 48 N. Y. 669; *McGean* v. *M. Ry. Co.*, 117 N. Y. 219; *Avery* v. *N. Y. C. & H. R. R. R. Co.*, 121 N. Y. 31.)

Louis Marshall and *Samuel Untermyer* for respondent. The proper measure of damages was applied in this case, and the rulings of the court on the evidence of value were correct. (*Krumm* v. *Beach*, 96 N. Y. 398; *Vail* v. *Reynolds*, 118 N. Y. 297; *Benedict* v. *G. T. Co.*, 91 App. Div. 103; 180 N. Y. 558; *Herfort* v. *Cramer*, 7 Col. 483; *Gustafson* v. *Rustemeyer*, 70 Conn. 125; *Antle* v. *Sexton*, 137 Ill. 410; *Nysewander* v. *Lowman*, 124 Ind. 584; *Wright* v. *Roche*, 57 Mc. 600; *Morse* v. *Hutchins*, 102 Mass. 439; *C. F. Co.* v. *Moffatt*, 147 Mass. 403.)

VANN, J. The case made by the complaint is as follows: In the spring of 1897 the defendant owned certain premises known as numbers 585 and 587 Broadway in the city of New

York with a commercial building twelve stories in height standing thereon. In June of that year, in order to induce the plaintiff to purchase said property, the defendants "falsely and fraudulently stated and represented that the store in said building was at that time leased to the firm of William Carroll & Company for the period of two years at a rental of $13,000 per annum." Said representation was false, as the the defendants knew, "in that the rental which the firm of William Carroll & Company were at that time legally obligated to pay did not amount to more than $10,500 per annum, although the defendants had fraudulently made out a lease for $13,000 per annum in favor of William Carroll & Company upon the private understanding and agreement with them that the rent which they were obligated to pay would not amount to more than $10,500 per annum." The plaintiff, relying on this representation and believing it to be true, entered into contract with the defendants "whereby he agreed to purchase the said property for the sum of $900,000, and agreed to pay said purchase price by the transfer of property and the payment of money, which together amounted in value to said sum." In reliance upon the same representation and on or about the 2nd of July, 1897, the plaintiff "carried out the said contract and purchased the said property for $900,000 and paid the purchase price thereof aforesaid." The plaintiff closed his complaint by alleging that he had been damaged by the premises to the extent of $50,000, for which sum he demanded judgment.

The defendants admitted the purchase but denied every other allegation in the complaint. The jury found a general verdict in favor of the plaintiff for $6,000 and under the rule of unanimous affirmance, which governs this appeal, the material allegations of the complaint, so far as they conform to the verdict, are conclusively presumed to be true.

While many questions are discussed in the points of counsel, only those relating to the measure of damages were orally argued before us, and owing to the conclusion reached we shall confine our review to that subject.

1. The first question thus discussed was raised as follows: An expert called by the plaintiff, on his direct examination, was asked this question: "Will you state what, in your opinion, was the value of these premises 585 and 587 Broadway, in June, 1898, with a lease upon the store, basement and sub-basement for two years at $13,000 per year — what was the fair market value?" This was objected to as immaterial and incompetent, but the objection was overruled, and subject to exception the witness answered: "Eight hundred thousand dollars."

The witness was then asked: "What, in your opinion, was the fair market value of that property at that time, June, 1897, with a lease of the store, basement and sub-basement for two years from February 1st, 1897, at $10,500 per year?" Subject to objection and exception the witness answered, "Seven hundred and fifty thousand dollars," and added, "So there would be a difference of $50,000 in the value based upon the difference in the rentals." This, as he subsequently explained, was upon the theory "of an increase of five per cent upon the investment." Thus the witness reached the difference of $50,000 in fee value by capitalizing the rentals mentioned in the two questions.

It appeared that the rent actually paid to the plaintiff by William Carroll & Company was at the rate of $13,000 a year during the period the lease had to run when they took possession, for the concessions and deductions by which, as the jury is presumed to have found, the rent reserved was in effect reduced to $10,500 per annum, were made in advance and the plaintiff knew nothing about them when he bought the premises. As the plaintiff lost no rent under the Carroll lease through the representation of the defendants, the damages are confined to the effect of that representation upon the fee value of the property.

The measure of damages is the difference between the market value of the premises if they had been as represented and their actual market value. Both parties assent to this proposition, but they differ as to the proper method of applying it to the case in hand.

We think the first question was competent, because it was necessary to make the situation as represented a part of the inquiry in order to admeasure the damages at all, for the plaintiff, as the injured party, was entitled to the benefit of the bargain he supposed he was making. There was no way to prove the damages sustained by him except by starting with the value of the premises if leased according to the representation.

The argument that the second question, involving the actual situation, was also competent, while plausible is unsound, because the test is the market value of the premises, which might be more or less than was indicated by the rent in fact reserved. The necessity which governs the first question has no application to the second. The rental value was competent, as evidence bearing on the fee value, but the actual rent was incompetent, because it depended, not on the market value, but on the accident of two minds, influenced it may be by special considerations, meeting upon a certain sum in making a lease of a new building with a desirable tenant for a short term. The actual value of this great piece of property is not affected by what the lessors and lessees may have thought upon the subject when making a lease of a small part thereof for two years, of which five months had expired when the plaintiff purchased. If the rent reserved had been but one dollar, the difference between that sum and $13,000, the amount of the rent as represented, when capitalized on the basis of the plaintiff's expert, would lead to a result so absurd as to show that there must necessarily be a flaw in the argument used to sustain the ruling. Rental value tends to prove fee value, because other things being equal, the income from property is a measure of its market value. Rental value is capable of exact determination and does not depend on a collateral agreement in the form of a lease of part of the property. The actual value of a building twelve stories high cannot be measured by the rent agreed upon for only the first floor and basement. It is the same building and the same land, whether that part be rented or not. Such rent cannot

be made the standard of the actual value of the entire property, yet that was the effect of the ruling now under consideration, which I think was erroneous.

2. Duly qualified experts called by the defendants were asked the following questions on their direct examination: "What in your opinion was the fair rental value of the store, basement and sub-cellar in 585 and 587 Broadway in the year 1897?"

"In June, 1897, what was the fair rental value of the store and basement No. 585 and 587 Broadway?"

"Whether $13,000 for a lease of two years of this store occupied by Carroll at 585 and 587 Broadway was below or above the fair rental value of the store in 1897."

These questions were separately objected to by the plaintiff's counsel as immaterial; the objection was sustained, and in each instance an exception was taken.

The object of the evidence called for by these questions was not to measure the damages but to show that none were sustained. The plaintiff claimed that he sustained damages on account of the false representation that the store and basement were leased for $13,000 a year and he was permitted, properly as we think, to inquire as to the value of the premises on that basis. His claim of damages was confined to that particular representation, which was limited to that particular part of the premises. Upon the issue as to whether the representation, even if false, did the plaintiff any harm, the defendants sought to show the actual rental value of the store and basement at the time in question. The object of the evidence was not to show the rental value of the entire building, floor by floor, but to prove that the rental value of the part to which the representation related was all that the representation called for. If the questions had been allowed and the witnesses had answered that the rental value was $13,000 a year or more and the jury had believed them, the plaintiff could have recovered nothing for he would have suffered no loss. In that event no reduction in fee value could have been effected by the representation. False representations do not warrant the recovery of

damages unless they cause pecuniary injury. A misrepresentation that the premises were leased at a certain rate could result in no damage, provided the rental value equalled or exceeded that rate. As the rent was paid plaintiff at the rate represented, he suffered no harm unless there was a contraction in fee value, caused wholly by the fact that the actual rental value of the part affected by the representation was less than it would have been if the representation had been true. The effort was not to establish the rental value of the entire building, but to directly answer the claim of the plaintiff that the representation caused him pecuniary loss. For this purpose it was proper that the defendants should confine their inquiry to the rental value of that portion of the building to which the representation itself was confined. The evidence excluded tended to meet squarely and directly the issue as to actual injury which was an essential part of the plaintiff's case. We think these rulings also raised reversible error.

The judgment should be reversed and a new trial granted, with costs to abide event.

GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ., concur; CULLEN, Ch. J., absent.

Judgment reversed, etc.

LEMBECK & BETZ EAGLE BREWING COMPANY, Appellant, *v.* THOMAS E. SEXTON et al., Defendants, and EDWARD P. HATCH, Respondent.

FORECLOSURE CHATTEL MORTGAGE — REMEDY — JURISDICTION — NEW TRIAL. A suit in equity to foreclose a chattel mortgage is proper whenever the legal remedy of the holder of the mortgage is inadequate; and in such a suit the form of pleading, mode of procedure and jurisdiction of the court are the same as in an action to foreclose a mortgage upon real property. The general rule that there can be no litigation of title paramount or hostile to the mortgage does not preclude the court from deciding the question whether an asserted title is in fact paramount or hostile in a case where that is one of the issues presented by the pleadings. Where a title, asserted as paramount and hostile to that of the mort-

gagee, is in fact not so, and the latter recovers judgment, it is error for the Appellate Division to attempt to modify the judgment by dismissing the complaint absolutely in favor of the defendant raising that issue, particularly when such defendant also contends that some of the chattels claimed by the mortgagee were delivered to the mortgagor after the execution of the mortgage, and the insufficiency of the evidence upon that issue, which may be changed on another trial, is the basis of the modification. In such a case there should be a direction for a new trial, and the defendant making the allegations is entitled to a jury trial upon that issue.

Lembeck & Betz Brewing Co. v. *Sexton*, 96 App. Div. 613, modified.

(Argued February 2, 1906; decided March 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 18, 1904, upon an order modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Benjamin G. Paskus and *Gibson Putzel* for appellant. The trial court was not only justified in finding, but, upon the pleadings and evidence, was required to find that the property in Hatch's possession was covered by the plaintiff's mortgage. (*Conkling* v. *Shelley*, 28 N. Y. 360; *Gardner* v. *McEwen*, 19 N. Y. 123; *Russell* v. *Winne*, 37 N. Y. 591; *Benedict* v. *Arnoux*, 154 N. Y. 715; *Snyder* v. *Seaman*, 157 N. Y. 449.) The title of the plaintiff to the goods under its mortgage is superior to any claim which the defendant Hatch can make. (*Barnard* v. *Campbell*, 58 N. Y. 73; *A. S. Refg. Co.* v. *Fancher*, 145 N. Y. 553; *Goodwin* v. *Wertheimer*, 99 N. Y. 149; *Caldwell* v. *Bartlett*, 3 Duer, 341; *Terry* v. *Munger*, 121 N. Y. 161; *Droege* v. *A. & O. Mfg. Co.*, 163 N. Y. 466; *Bach* v. *Tuck*, 126 N. Y. 53; *Acer* v. *Hotchkiss*, 97 N. Y. 395; *Schoneman* v. *Chamberlain*, 55 App. Div. 351.) The defendant Hatch was not entitled to a trial by jury of the issues raised by his answer. (*S. C. Co.* v. *Arnott*, 152 N. Y. 584; *Blake* v. *Crowley*,

44 Hun, 344; *Kenney* v. *Apgar*, 93 N. Y. 539; *K. Ins. Co.* v. *Nelson*, 8 Hun, 21; *Fox* v. *Fitzsimmons*, 29 Hun, 574; 100 N. Y. 618; *Ostrander* v. *Webber*, 114 N. Y. 95; *Pike* v. *Setter*, 15 Hun, 402.) The rights of the defendant Hatch were properly the subject of adjudication in this foreclosure suit. (*Ruyter* v. *Reid*, 121 N. Y. 498; *Wade* v. *Streyer*, 166 N. Y. 25; *Brown* v. *Volkening*, 64 N. Y. 76; *Mendenhall* v. *Hall*, 134 U. S. 559.) In any aspect of the case the plaintiff was certainly entitled to a new trial, and judgment absolute as between it and the defendant Hatch should not have been rendered by the Appellate Division. (*Heller* v. *Cohen*, 154 N. Y. 299; *Matter of Chapman*, 162 N. Y. 456; *Benedict* v. *Arnoux*, 154 N. Y. 715; *Dixon* v. *James*, 181 N. Y. 129; *N. Y. B. N. Co.* v. *H. B. N. Co.*, 180 N. Y. 280; *Van Beuren* v. *Wotherspoon*, 164 N. Y. 368; *Edson* v. *Bartow*, 154 N. Y. 215.)

Emanuel J. Myers for respondent. The finding that Hatch holds possession of property covered by the plaintiff's mortgage is an essential fact found without any evidence which, according to any reasonable view, would warrant it, and constitutes error of law. (*Conkling* v. *Shelley*, 28 N. Y. 360.) The finding that the lien of said mortgage is prior to that of any lien, title or property which the defendant Hatch has therein, and the right, title, interest or lien, if any, which the said Hatch has in the property has accrued subsequently to the lien of the mortgage, is without evidence to support it and constitutes error of law. (*Conkling* v. *Shelley*, 28 N. Y. 360; *E. S. Co.* v. *Grant*, 114 N. Y. 40; *Galle* v. *Tode*, 148 N. Y. 270; *R. P. Co.* v. *O'Dougherty*, 81 N. Y. 474; *Droege* v. *A. & O. Mfg. Co.*, 163 N. Y. 466.) The defendant Hatch claims adversely to and in hostility with the mortgagor and mortgagee by title prior and paramount to such parties, and his title cannot be tried in an action to foreclose the mortgage under a general averment that his interest is subordinate to the mortgage. (*E. S. Bank* v. *Goldman*, 75 N. Y. 127; *Rathbone* v. *Hooney*, 58 N. Y. 467; *McReynolds*

v. *Manus*, 11 Abb. [N. C.] 369; *E. S. Bank* v. *Chute*, 33 Hun, 82; *Lanier* v. *Smith*, 37 Hun, 529; *Holcombe* v. *Holcombe*, 2 Barb. 20; *Frost* v. *Koon*, 30 N. Y. 428; *Bank of England* v. *Flagg*, 3 Barb. Ch. 316, 318; *Lewis* v. *Smith*, 9 N. Y. 502; 11 Barb. 156; *Payn* v. *Grant*, 23 Hun, 134, 138.) The defendant Hatch was entitled to have his claim tried in a common-law action with a trial by jury. (*Baird* v. *Mayor, etc.*, 74 N. Y. 382; *Bailey* v. *Aldrich*, 40 N. Y. 504; *Romeyn* v. *Sickles*, 108 N. Y. 650; *Neudecker* v. *Kohlberg*, 81 N. Y. 296.) The Appellate Division was justified by the condition of the record in modifying the judgment by dismissing the complaint as to Mr. Hatch as it is apparent that all the facts were disclosed, and on a new trial they could not be changed. (Code Civ. Pro. § 1317; *Edson* v. *Bartow*, 154 N. Y. 199; *Mansfield* v. *Mayor*, 165 N. Y. 208; *Brackett* v. *Griswold*, 128 N. Y. 644; *Marquat* v. *Marquat*, 12 N. Y. 340; *Fairchild* v. *Edson*, 154 N. Y. 199; *Husted* v. *Thompson*, 158 N. Y. 328; *Wood* v. *Boson*, 60 Hun, 337; *Coster* v. *Shipman*, 35 N. Y. 533; *Fischer* v. *Blank*, 138 N. Y. 669; *Arnold* v. *Rothschild Co.*, 23 App. Div. 221; 154 N. Y. 725; *Shotwell* v. *Dixon*, 163 N. Y. 44.)

WERNER, J. This is an action to foreclose a chattel mortgage and it presents a most curious medley of questions, only a few of which are necessarily involved in the disposition of this appeal. The mortgage sought to be foreclosed was given to the plaintiff by the defendant Sexton on the 7th day of July, 1896, to secure payment of the sum of $4,958.50 for moneys loaned and advanced by the former to the latter. The mortgaged property consisted of Sexton's leasehold interest in a hotel and saloon known as No. 55 Whitehall street in the city of New York, of certain chattels enumerated in a schedule annexed to the mortgage and referred to as then being in the saloon, and of certain horses, wagons and harness in a stable on other premises. Various persons are named as parties defendants, but the defendant Hatch is the sole

respondent and it is between him and the plaintiff that the questions in the case arise.

The complaint, after setting forth several loans of money by the plaintiff to the defendant Sexton, the execution, delivery and filing of the chattel mortgage, and the failure of the mortgagor to comply with its terms, charges that the defendant Hatch holds in his possession part of the mortgaged property particularly described in Schedule A annexed to the complaint; that said property was subject to said mortgage, and that the lien of said mortgage is prior to any lien, title or property which the defendant Hatch has therein; that if the defendant Hatch has any right, title, interest or lien in the property described in said schedule, it has accrued subsequently to the lien of plaintiff's mortgage.

These latter allegations of the complaint are denied by the answer of the defendant Hatch, which, by way of separate defense, asserts Hatch's ownership of the mortgaged property; Sexton's possession thereof under a pretended sale from Hatch procured and induced by the false and fraudulent representations of the former as to his financial responsibility; the defendant Hatch's rescission of the sale upon ascertaining the fraud practiced upon him by Sexton, and Hatch's subsequent retaking of the property in an action of replevin brought against Sexton and one Carroll.

Upon the issues thus framed by the pleadings and supplemented by the proofs of the parties, the learned trial court gave judgment for the plaintiff. Upon appeal to the Appellate Division that court agreed upon a so-called modification of the judgment which was really a reversal because it dismissed the complaint in favor of the defendant Hatch, and from that decision the plaintiff has appealed to this court.

The first question to be considered is whether the learned trial court was right in deciding that the title of the defendant Hatch to the chattels in dispute was inferior and subordinate to the title of the plaintiff under its mortgage. The decision of that question obviously depends upon the nature and scope of the action at bar, as limited by the range of the

pleadings and proofs. An action in equity to foreclose a chattel mortgage, although not the only method of procedure in this state, is doubtless a remedy which a mortgagee may properly invoke whenever his legal remedy is inadequate. (*Briggs* v. *Oliver*, 68 N. Y. 339.) When a chattel mortgage is foreclosed in an equitable action, the form of the pleading, the mode of procedure and the jurisdiction of the court are necessarily the same as in actions to foreclose mortgages upon real property, except as modified by statute (§§ 1737–1741, Code Civ. Pro.); and one of the recognized limitations upon equitable jurisdiction in such actions is that there can be no litigation of title paramount or hostile to the mortgage. (*Lewis* v. *Smith*, 9 N. Y. 502; *Merchants' Bank* v. *Thomson*, 55 id. 7; *Rathbone* v. *Hooney*, 58 id. 467; *Em. Ind. Savings Bank* v. *Goldman*, 75 id. 127.) There may be instances, however, in which the very question to be decided is whether the rights of a defendant in a foreclosure suit are superior or subordinate to those of the mortgagee, and in such cases a court of equity must logically have the right to decide the question upon which its jurisdiction depends. In the case at bar the defendant Hatch sought to plead a title hostile and paramount to that of a mortgagee. But he went further and pleaded a history of the transactions between himself and the defendant Sexton, from which it appears that in April, 1896, the latter became the apparent owner and possessor of the chattels in dispute under a contract of sale; that while in such possession and apparent ownership, and on July 7th, 1896, the defendant Sexton executed to the plaintiff the mortgage in suit; that on the 22d day of August, 1896, after Hatch had ascertained that Sexton had made false and fraudulent representations as to his financial responsibility, and in reliance upon which Hatch had sold him the chattels, Hatch elected to rescind the sale, brought an action in replevin against Sexton and one Carroll, and took possession of the chattels by virtue of the writ issued therein. This pleading and the evidence by which it was supplemented established the very facts upon which it became the duty of the learned trial court

to decide against the defendant Hatch as a matter of law. The sale from Hatch to Sexton, even if induced by fraud, was not void, but merely voidable, and this is equally true whether it was on credit, as alleged in Hatch's answer, or for cash, as his proof tends to show. It was shown that the plaintiff became a *bona fide* mortgagee before Hatch's attempted rescission of his sale to Sexton, the mortgagor. Under these circumstances it cannot be doubted that the plaintiff acquired a good title under its mortgage. Sexton's possession was not like that of a thief or a naked bailee. He was in possession under color of an actual sale, which, although induced by his fraud and voidable as between his vendor and himself, enabled him to give a legal title to a *bona fide* purchaser. (*Paddon* v. *Taylor*, 44 N. Y. 371; *Comer* v. *Cunningham*, 77 id. 391; *Barnard* v. *Campbell*, 58 id. 73; *Am. S. R. Co.* v. *Fancher*, 145 id. 561.) This view of the case disposes of several of the incidental questions argued for the respondent Hatch. 1. The denial of his demand for a jury trial was not error, because upon his answer and the evidence the plaintiff was entitled to judgment as matter of law. 2. For the same reason it was proper to exclude the evidence offered by the defendant Hatch tending to establish Sexton's false and fraudulent representations in procuring the sale to him, because the facts alleged, even if admitted, would have constituted no defense to plaintiff's claim.

If there were nothing in the case beyond what is contained in the foregoing statement, it would seem to follow as a matter of course that the learned trial court was right in giving judgment for the plaintiff, and that the learned Appellate Division was wrong in substantially reversing that judgment. There is, however, another phase of the controversy that gives the case a somewhat different aspect. The proof is that the mortage to the plaintiff was executed and delivered on July 7th, 1896. There is also evidence tending to show that some of the chattels claimed under the mortgage were not delivered by Hatch to the mortgagor until after that date. Chattels delivered subsequent to the execution and delivery of

the mortgage would, of course, not be covered by it. This was really the point upon which the case was decided in the Appellate Division. It was there held that there was no testimony of the several deliveries of the goods sold by Hatch to Sexton, which extended from April 24th to July 24th, 1896, except that contained in a bill upon which the items delivered after the execution of the mortgage were checked off by a witness and identified by the initials of the trial judge. "But," said the learned justice writing for the Appellate Division, "this bill does not appear to be in evidence, and there is nothing to show which goods the witness marked as having been delivered after the 7th of July." This being the ground upon which the learned Appellate Division placed its decision, we are at a loss to understand why a new trial was not granted instead of directing a final dismissal of the complaint as to the defendant Hatch, because the defect of proof referred to was such as might, in the ordinary course of events, be remedied on another trial. While the answer of the defendant Hatch furnishes very slight support for the contention that any of the chattels in dispute were delivered to Sexton after the execution by him of the mortgage to the plaintiff, we think it was sufficient to raise the issue of an independent and paramount title in Hatch as to such chattels, and upon that issue he was entitled to a jury trial. This conclusion leads to a modification of the order of the Appellate Division by directing a new trial instead of a dismissal of the complaint, and the affirmance of that order as thus modified, with costs to abide the event.

CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, HISCOCK and CHASE, JJ., concur.

Judgment accordingly.

MARY S. VAN WINKLE, Respondent, *v.* ELIZABETH M. VAN WINKLE, Respondent, and GRACE B. RUGGLES et al., Appellants, Impleaded with Others.

1. HIGHWAYS — PRESUMPTION AS TO OWNERSHIP OF FEE OF ROADBED. While it is the general rule that the fee of the soil of a highway is presumed to belong to the adjoining owners, and that a person holding land bounded by a highway is *prima facie* the owner to the center of the highway subject to the easement of the public to the right of way, such presumption may be rebutted by an express provision in the deed to such owner to the effect that the fee to the highway was not intended to be conveyed, or by the use of such words as necessarily exclude the highway from the description of the premises conveyed; but where there is ambiguity with reference to the description or to the commencing point, or where there is doubt with reference to the intent of the grantor, the presumption that the fee was intended to pass will prevail; for in such case the construction must be that most favorable to the grantee.

2. PARTITION — EFFECT OF RECITALS IN DEEDS PARTITIONING LANDS UNDER AGREEMENT UPON QUESTION WHETHER TITLE TO CENTER OF HIGHWAY WAS CONVEYED OR NOT. Where land sought to be partitioned in an action in the Supreme Court was formerly the bed of a road, or public highway, running through lands formerly owned by a common ancestor of parties to the action, claiming under certain ancient deeds, and which highway was discontinued by acts of the legislature long after the execution of such deeds, so that the fee to the roadbed reverted to the then owners of the adjoining lands unless the title thereto had been reserved by such deeds, and it appears from recitals therein that such deeds were executed by the heirs of the common ancestor under an agreement to partition all of the real estate of such ancestor among themselves, and that such partition had reference to all the lands of such ancestor bounded upon such public highway, it must be held that such heirs intended that such partition should have the same force and effect as if made in court; and that they designed to divide among themselves all of the lands belonging to their ancestor, including the fee to the road bed in question, where the latter was not reserved by express provisions in such deeds, or by use of words necessarily excluding it from the description of the lands conveyed.

3. DEEDS — BOUNDARIES AND DESCRIPTION OF LAND ABUTTING ON A STREET OR HIGHWAY — WHEN TITLE TO CENTER OF ROADBED OF STREET, OR HIGHWAY, IS CONVEYED. Where a line runs to a stake or to a mark upon a fence or a tree upon the side of a highway, and thence along the highway, the stake, mark or tree will be deemed to indicate the place of the line and not the end thereof, by reason of the

difficulty of maintaining a visible object marking the corner in the road-bed of a highway, thus vesting the title to the center of the street, or highway, in the grantee.

4. SAME. Where a deed gives the boundaries of land conveyed by courses and distances, without mentioning a street by which the same is bounded on one side, and it appears that the distance given does in fact carry the boundary to the street and along it, it is the same as though the boundary were described as running to the street and along the same, thus extending the title to the center.

Van Winkle v. *Van Winkle*, 95 App. Div. 605, affirmed.

(Argued February 15, 1906; decided March 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 9, 1905, affirming a judgment entered upon a decision of the court at Special Term in an action to partition and remove a cloud on the title of certain real property, and also affirming an interlocutory judgment therein and an order denying a motion for a new trial.

The facts, so far as material, are stated in the opinion.

Peter A. Hendrick and *James A. Deering* for Grace B. Ruggles et al., appellants. The conveyances made upon the partition of 1802 to Ann Apthorp and Charlotte Vandenheuvel, and by the Apthorp heirs in 1799 to William Jauncey, and the subsequent conveyances made by Ann Apthorp and the heirs of Charlotte Vandenheuvel did not include the soil of the cross road or "Apthorp's Lane." (*English* v. *Brennan*, 60 N. Y. 609; *White's Bank* v. *Nichols*, 64 N. Y. 65; *K. C. Ins. Co.* v. *Stevens*, 87 N. Y. 287; 101 N. Y. 411; *Tag* v. *Keteltas*, 92 N. Y. 625; *Dexter* v. *R. & O. Mills*, 39 N. Y. S. R. 933; 133 N. Y. 684; *Holloway* v. *Delano*, 139 N. Y. 390; *Patten* v. *N. Y. El. R. R. Co.*, 3 Abb. [N. C.] 306; *Lee* v. *Lee*, 27 Hun, 1; *Morison* v. *N. Y. El. R. R. Co.*, 74 Hun, 398; *Matter of St. Nicholas Terrace*, 76 Hun, 209; 143 N. Y. 621; *Deering* v. *Reilly*, 38 App. Div. 164; 167 N. Y. 184.) The partition deeds of November 30, 1802, to Charlotte Vandenheuvel and Ann Apthorp, and the deed to William Jauncey of August 1, 1799, established by

estoppel the fact that all the heirs of Chas. W. Apthorp were then the owners of all the land of which he died seized, which included the premises in question. (Hopkins on Real Prop. 408, 435; *Carver* v. *Jackson*, 4 Pet. 1; *Usina* v. *Welder*, 58 Ga. 178; *Lucas* v. *Beebe*, 88 Ill. 427; *Redwood* v. *Tower*, 28 Minn. 45; *Green's Appeal*, 97 Penn. St. 342; *School Dist.* v. *Stone*, 106 U. S. 183; *Bowman* v. *Taylor*, 2 Ad. & El. 278; *Jackson* v. *Parkhurst*, 9 Wend. 209; *Torrey* v. *Bank of Orleans*, 9 Paige, 649; 7 Hill, 260; *Roosevelt* v. *Smith*, 17 Misc. Rep. 326; *Inskeep* v. *Shields*, 4 Har. [Del.] 345; *Morris* v. *Wheat*, 8 App. Cas. [D. C.] 379; *Pinckard* v. *Milmine*, 76 Ill. 453.) The partition deeds of November 30, 1802, under which the plaintiff's title is derived, taken in connection with the other partition deeds then made, and the many instruments, declarations, etc., by Hugh Williamson, and the subsequent chain of title to the present owners in the tract, clearly establish as a fact that between the date of the sheriff's deed to Hugh Williamson and the date of the partition deeds all the children of Charles W. Apthorp became reinvested with the title. (L. 1896, ch. 547; *Rawson* v. *Lampman*, 5 N. Y. 456; *Woerz* v. *Rademacher*, 120 N. Y. 62; *Verdin* v. *Slocum*, 71 N. Y. 347; *Wright* v. *Douglass*, 7 N. Y. 564; *Urame* v. *Coates*, 109 Mass. 581; *Hutchins* v. *Van Vechten*, 140 N. Y. 115; *Ellwood* v. *Northrup*, 106 N. Y. 172; *Wadd* v. *Hazelton*, 137 N. Y. 215; *Van Cott* v. *Prentice*, 104 N. Y. 45; *Baylor* v. *Tillebach*, 49 S. W. Rep. 720.) The title of the appellants as heirs at law of the children of Chas. W. Apthorp is not affected by the finding of the jury. (*Pinckard* v. *Milmine*, 76 Ill. 453; Herman on Estoppel, §§ 576, 610; *Patterson* v. *U. S.*, 2 Wheat. [U. S.] 221; *McCarthy* v. *Hudson*, 24 Wend. 291; *Loew* v. *Stocker*, 61 Penn. St. 347; *Kansas R. Co.* v. *Pointer*, 14 Kan. 37; *M'Lean* v. *Copper*, 3 Call [Va.], 367; *Goosely* v. *Holmes*, 3 Call [Va.], 424; *Clay* v. *Ransome*, 1 Munf. [Va.] 454; *Tunnell* v. *Watson*, 2 Munf. [Va.] 283; *Geddy* v. *Butler*, 3 Munf. [Va.] 345; *Robison* v. *Brock*, 1 Hen. & M. [Va.] 213.)

Edward R. Vollmer for Julia F. Hamilton et al., appellants. Upon November 30, 1802, when the partition deeds were made among the heirs of Charles W. Apthorp, all the persons named in the partition deeds then executed who were the heirs at law of Charles Ward Apthorp were owners of the premises in question. (3 Washb. on Real Prop. ch. 2, § 6; 1 Greenl. on Ev. § 23; *Carver* v. *Jackson*, 4 Pet. 1; *Jackson* v. *Parkhurst*, 9 Wend. 209; *Jacques* v. *Short*, 20 Barb. 269; *Gilbert* v. *Peteler*, 38 Barb. 488; *Jackson* v. *Neeley*, 10 Johns. 374; *Jackson* v. *Thompson*, 6 Cow. 178; *Hardenburgh* v. *Lakin*, 47 N. Y. 111; *Bissing* v. *Smith*, 85 Hun, 564; *Crowell* v. *Beverly*, 134 Mass. 98; *Tobey* v. *Taunton*, 119 Mass. 404; *Fox* v. *U. S. Refinery*, 109 Mass. 292.) The findings of the jury upon the trial of certain issues before Trial Justice SCOTT in March, 1902, are immaterial so far as these defendants are concerned, or in fact so far as any issue is presented as to the ownership by the Apthorp heirs in November, 1802, of the premises in question. (Herman on Estoppel, §§ 577, 610; *Gilman* v. *Stetson*, 16 Me. 124; *Shaw* v. *Parker*, 6 Blackf. [Ind.] 345; *Van Riper* v. *Berdan*, 14 N. J. L. 132; *Brock* v. *Nelson*, 29 S. C. 49.) These defendants' ancestors have never conveyed the land in the southerly half of the cross road. (*Holloway* v. *Delano*, 139 N. Y. 390; *English* v. *Brennan*, 60 N. Y. 609; *K. C. Ins. Co.* v. *Stevens*, 87 N. Y. 287; 101 N. Y. 411; *Tag* v. *Keteltas*, 92 N. Y. 625; *Lee* v. *Lee*, 27 Hun, 1; *Deering* v. *Reilly*, 167 N. Y. 184; *Harris* v. *Elliott*, 10 Pet. 30; *Bartow* v. *Draper*, 5 Duer, 130; *Coster* v. *Peters*, 5 Robt. 192; *Van Amringe* v. *Barnett*, 8 Bosw. 357; *Thayer* v. *Finton*, 108 N. Y. 394.) There is no equity whatever in the claim of the plaintiff Van Winkle and the defendant Van Winkle to the absolute ownership of the fee of the cross road simply because at the time it was closed upon the city map they were owners of the adjoining lands if the deeds under which they were owners of the adjoining lands do not include it. (*Wheeler* v. *Clark*, 58 N. Y. 267; *K. C. Ins. Co.* v. *Stevens*, 101 N. Y. 411; *King* v. *Mayor, etc.*, 102 N. Y. 175; *Darker* v. *Beck*, 32 N. Y. S. R. 193; *Jackson* v. *Hathaway*, 15 Johns. 447.)

Edward Mitchell for plaintiff, respondent. The releases of November 30, 1802, are as if offered by the grantors as evidence in their own favor against their own grantees. They are not evidence in favor of the grantors or claimant defendants against the grantees or the Van Winkles, but are evidence in favor of the Van Winkles, nor are they proof of "co-tenancy." (*McKinnon* v. *Bliss*, 21 N. Y. 206.) The grants are of "Lot No. 6" and "Lot No. 8," as shown on the "Taylor Map," and the descriptions by metes and bounds convey to the center of the lane. (*Bissell* v. *N. Y. C. R. R. Co.*, 23 N. Y. 61; *Matter of Ladue*, 118 N. Y. 213; *Haberman* v. *Baker*, 128 N. Y. 253; *Hennessey* v. *Murdock*, 137 N. Y. 317; *Matter of Mayor, etc.*, 20 App. Div. 404; *Potter* v. *Boyce*, 73 App. Div. 383; *Jackson* v. *Hathaway*, 15 Johns. 447.)

David B. Ogden, *Henry F. Miller* and *William Mitchell* for defendant respondent. It was not error to direct the jury to answer in the negative the question whether Hugh Williamson purchased and held the property sold under the foreclosure sale as agent or trustee of the heirs of Charles Ward Apthorp, and whether, when he conveyed these premises, he did so at the request of the heirs of Charles Ward Apthorp, and for their use and benefit. (*Steere* v. *Steere*, 5 Johns. Ch. 1.) There is no evidence of a conveyance by Williamson to the Apthorp heirs. The Van Winkles are not bound by the recitals in the deeds of November 30, 1802. (*Robertson* v. *Pickrell*, 109 U. S. 608; *Edmonston* v. *Edmonston*, 13 Hun, 133; Bigelow on Estoppel, 286; *Carpenter* v. *Buller*, 8 M. & W. 209.) Even if in some unexplained way the heirs of Charles Ward Apthorp had acquired as tenants in common in 1802 Hugh Williamson's title to the farm, including the bed of the Apthorp lane, the partition deeds executed in that year conveyed to each grantee the one-half of the bed of the Apthorp lane adjoining the premises granted. (*Hennessey* v. *Murdock*, 137 N. Y. 317; *Graham* v. *Stern*, 168 N. Y. 517; *Bissell* v. *N. Y. C. R. R. Co.*, 23 N. Y. 61; *Seneca Nation*

v. *Knight*, 23 N. Y. 498; *Child* v. *Starr*, 4 Hill, 369; *Kings Co. Fire Ins. Co.* v. *Stevens*, 87 N. Y. 287; *Matter of Ladue*, 118 N. Y. 220.)

HAIGHT, J. This action was brought for the partition of a parcel of land, which formerly was the roadbed of a public road known as Apthorp's lane or cross road to Harlem, bounded on the east by the westerly line of Eighth avenue or Central Park West and on the west by a line drawn parallel to the westerly line of Eighth avenue across such public road two hundred and forty-eight feet four and one-half inches westwardly therefrom. The plaintiff and the defendant Elizabeth M. Van Winkle are sisters and their grantors are the owners of the lands abutting upon such public highway on either side thereof. The road in question was opened through a farm or tract of land formerly owned by Charles Ward Apthorp prior to his death, which occurred in the year 1797, and extended from the Bloomingdale road to the Harlem commons. It continued to be used as a public road until after the laying out and opening of Ninety-third and Ninety-fourth streets on either side of such roadway, after which it was discontinued by an act of the legislature in the year 1867 (Ch. 697) and 1895 (Ch. 1006). The defendants-appellants claim title to the roadbed as the heirs at law or as the grantees of such heirs of Charles Ward Apthorp, who it is admitted, died seized of the premises in controversy.

The complaint, among other things, alleged that the plaintiff and the defendant Elizabeth M. Van Winkle and their predecessors in title had been in the possession of such roadbed for more than twenty years before the commencement of this action, and that after the death of Charles Ward Apthorp one Hugh Williamson became seized and possessed of the whole of said Apthorp farm, including the roadbed to such cross road on the 23d day of April, 1799. The answer interposed by the defendants put in issue the allegation of adverse possession by the plaintiff and her co-tenant, and alleged, in substance, that Williamson became such grantee as the agent

and trustee of the heirs of Charles Ward Apthorp, deceased, and that the subsequent conveyances made by him were at the request of such heirs and for their use and benefit. Upon these issues formed by the pleadings the case was first moved for trial before Justice SCOTT and a jury, upon an order settling issues as to the question of adverse possession and as to whether Williamson took title as agent and trustee of the heirs of Apthorp. The trial resulted in the jury's answering all of the questions so ordered to be tried in the negative by direction of the court, and thereupon the case was moved for trial before Justice O'GORMAN at Special Term, who first denied a motion to set aside the verdict of the jury, and then upon a trial of the issues raised by the pleadings rendered a decision in favor of the plaintiff and her co-tenant, the defendant Elizabeth M. Van Winkle, in the short form, stating as his grounds therefor: (1) That Hugh Williamson, upon a foreclosure sale in 1799, acquired the title to all the premises in question, and that his title was absolute and unqualified; that no conveyance from him to the Apthorp heirs had been proved or could be presumed; that the deeds in which the Apthorp heirs joined were intended only as confirmatory deeds so as to operate by way of estoppel against claims that might thereafter be made by them or by their descendants; that if such deeds were held to exclude the roadbed of the cross road it would follow that the title thereto was in Hugh Williamson or his heirs and not in the appellants-defendants. (2) That the confirmatory deeds by the Apthorp heirs carried the grant in each instance to the center of the road; that the presumption is that the conveyance of land bounded by an existing street or road carries the fee to the center, and in case of ambiguity the construction most favorable to the grantee must be adopted; that the lots in question were sold by reference to a map and the recital in the confirmatory deeds of a purpose to dispose of the entire estate establishes that the conveyances extended to the center line of the abutting lane; that in none of the descriptions is reference made to the side of the road; the words "beginning at a stake by the

fence of the Cross Road" considered with the remainder of the description did not necessarily indicate an intention to confine the grant to the side of the roadway; that there is nothing in the deeds in question sufficient to overcome the presumption against the grantors' intending to reserve the title to the soil of the highway. The justice, therefore, concluded that the defendants, other than the defendant Van Winkle, had no interest in or title to any part of the premises in question either at law or in equity. Exceptions were filed to this decision only by the defendants Jane E. Holloway and others, appearing by James A. Deering as attorney. Thereupon an interlocutory judgment was entered and commissioners of partition appointed, upon whose report final judgment was entered, from which an appeal was taken to the Appellate Division and subsequently to this court, in which the appellants have given notice of a desire to review the order denying a new trial before the jury, and the interlocutory judgment.

As to the issues that were tried before Justice SCOTT and a jury, those pertaining to the question of adverse possession were disposed of in favor of the defendants-appellants and those questions, therefore, require no further consideration. As to the questions whether Hugh Williamson, in purchasing the premises upon the foreclosure sale, acted as the agent and trustee of the heirs of Apthorp or disposed of the property at their request and for their use and benefit, we have found no evidence that would justify a verdict of the jury in the affirmative, and, therefore, we consider the verdict of the jury answering the questions in the negative by direction of the court as disposing of those questions. We are thus brought to a consideration of the decision of Justice O'GORMAN as made upon the trial at Special Term. As we have seen, it was in the short form, so called, and must, therefore, be given the same force and effect as a verdict of a jury. (*Dr. David Kennedy Corp.* v. *Kennedy*, 165 N.Y. 353; *Cutter* v. *Gudebrod Bros. Co.*, 168 N. Y. 512.) The trial court has found that the deed given to Hugh Williamson by the sheriff upon the fore-

closure sale in 1799 operated to vest in him the absolute and unqualified title to the premises in question, and that no conveyance by him to the Apthorp heirs had been proved and that no such conveyance could be presumed. It appears that Apthorp, prior to his death, executed a mortgage upon so much of his farm as was east of the Bloomingdale road to the Marine Society of the City of New York for the sum of two thousand five hundred dollars, which mortgage covered three separate parcels, one consisting of about seventy-five acres, another of eighty-five and the third of about fifty acres of land; that after the death of Apthorp the Marine Society holding the mortgage instituted an action for the foreclosure of the mortgage in the Court of Chancery, in which it was determined that there was then owing for principal and interest the sum of two thousand eight hundred twenty-six dollars and sixty-six cents; that judgment was entered for foreclosure and sale, and that upon such sale the property was bid in by Hugh Williamson for the sum of ten thousand three hundred pounds; that that amount was paid over to the sheriff who executed and delivered to him the deed referred to; that the sheriff, out of such sum, satisfied the claim of the Marine Society, and then, upon the consent of the heirs of Apthorp, paid over the balance to Robert Troop, as administrator of Apthorp's estate. No question is raised by the appellants with reference to these facts, or that Hugh Williamson thereby became vested with the title to the road-bed of the lane or of the lands abutting thereon upon either side. It is contended, however, that subsequently he reconveyed his interest to the heirs of Apthorp, excepting and reserving only the interests of his two minor children, who were the grandchildren of the decedent and entitled to a one-ninth part of his estate, and that such conveyance was made is apparent from the recitals contained in the deeds subsequently executed by the heirs partitioning among themselves the lands of Apthorp which had not been otherwise sold or disposed of. It appears that in November, 1802, the Apthorp heirs executed conveyances to one another, parti-

tioning among themselves the lands of the decedent Apthorp remaining undisposed of, and that in such conveyances Hugh Williamson had set off to him one parcel and that he joined in the conveyance of the other parcels to the other heirs of Apthorp. The deeds contained the recital as follows: "Whereas, the said party of the first and second parts are the proprietors, as tenants in common of all the real estate whereof Charles Ward Apthorp, late of Bloomingdale in the Seventh Ward of the City and County of New York, esquire, died seized at Bloomingdale aforesaid; and whereas, the said party of the first and second parts as aforesaid as proprietors of the said real estate did, in virtue of a written agreement bearing date the 29th day of May in the year 1801, proceed to make partition of said real estate among themselves; and whereas, upon such partition the lot of land hereinafter particularly described fell to the share of said party of the second part." In addition to this, it appears that a survey had been made and a map drawn of the premises, which is known as the Taylor map, dated May, 1801, in which the lands left to be partitioned were divided into lots numbered one to eight, inclusive, and that, according to papers found in the handwriting of Hugh Williamson, the value of each lot was given, and was finally equalized by the distribution of the other proceeds of the estate, and that the value of such lots amounted to about twenty thousand dollars. No conveyance has been discovered from Williamson to the heirs other than the recitals contained in the deeds, to which reference has been made, and no explanation is given of the large surplus, amounting to nearly nine thousand pounds, that was paid by Williamson to the sheriff, and by him turned over to the administrator of the Apthorp estate. The trial court, as we have seen, has found that no conveyance by Williamson to the Apthorps has been proved and none can be presumed. It appears that Williamson, after he acquired title by virtue of the sheriff's deed, executed conveyances to some, if not all, of the heirs at law, and the trial court finds that the conveyances by the heirs to one another were intended only as confirmatory deeds, so as

to operate by way of estoppel against claims that might thereafter be made by them or their descendants. We realize fully the force of the contention of the appellants based upon the recitals contained in those deeds. The executing of separate deeds by Williamson of different lots to the Apthorp heirs, in accordance with their agreement to partition in 1801, is inconsistent with the recital contained in the other deeds, to the effect that they were all tenants in common, and this, to some extent, gives support to the theory of the trial court that the subsequent deeds in which all of the heirs joined were deemed and were given for the purpose of confirming the title already conveyed by Williamson.

Our jurisdiction to review is limited to questions of law. We must, therefore, in order to reverse a finding of a trial judge, hold that there is no evidence to sustain the finding. This, we think, cannot properly be done in this case. We have concluded, however, to consider the deeds in which the heirs of Apthorp joined for the purpose of determining whether they included the roadbed of the lane.

The general rule, both in England and in this state, is that the fee of the soil of the highway is presumed to belong to the adjoining owners and that a person holding land bounded on a highway between two estates is *prima facie* the owner to the center of such highway subject to the easement of the public to the right of way, but that such presumption can be rebutted by an express provision in the deed to the effect that the fee to the highway was not intended to be conveyed, or by the use of such words as necessarily exclude the highway from the description of the premises conveyed, as where the description of the premises is bounded upon the exterior line of a highway or commences at a point upon one side thereof and thence runs along the side to a point specified, but where the premises are bounded by, on or along a highway, or running along a highway without restricting or controlling words, the instrument must be construed as conveying the grantor's title in the land to the center of the highway. The commencement of the description of premises at a corner or

a point particularly specified is always considered important, for ordinarily more attention is given by the parties to the locating of the point of commencement of the description than to the other points, but it is not conclusive, and where it is inconsistent with the other lines described, which show an intent to include or exclude the fee of the highway, effect will be given such intent; and where there is ambiguity with reference to the description or to the commencing point, or where there is doubt with reference to the intent of the grantor, the presumption that the fee was intended to pass will prevail; for in such case the construction must be most favorable to the grantee. Where a survey gives the dimensions and quantity of the land conveyed exclusive of the public way, it does not operate to destroy the presumption that the fee to the roadbed was conveyed; for the reason that such dimensions and quantity of the usable land is ordinarily deemed by the purchaser of paramount importance in determining its availability for the uses designed by him. Where a deed gives the boundaries of the land conveyed by courses and distances, without mentioning a street by which the same is bounded on one side, but where it appears that the distance given does in fact carry the boundary to the street and along it, it is the same as though the boundary were described as running to the street and along the same, thus extending the title to the center; and where a line runs to a stake or to a mark upon a fence or a tree upon the bank of a stream or upon the side of a highway, and thence along the meandering of the stream or along the highway, the stake, mark or tree will be deemed to indicate the place of the line and not the end thereof, by reason of the difficulty of maintaining a visible object marking the corner in the middle of a stream or in the roadbed of a highway, thus vesting the title in the grantee. (See 4 Am. & Eng. Ency. of Law [2d ed.], p. 809, and authorities there cited; also *French* v. *Carhart*, 1 N. Y. 96; *Putzel* v. *Van Brunt*, 8 J. & S. 501; *Livingston* v. *Ten Broeck*, 16 Johns. 14; Cowen & Hill's Notes to Phillips on Evidence, No. 526,

p. 802; *Jackson* v. *Hudson*, 3 Johns. 375; *Sizer* v. *Devereux*, 16 Barb. 160; *Bissell* v. *N. Y. C. R. R. Co.*, 23 N. Y. 61; *Seneca Nation of Indians* v. *Knight*, 23 N. Y. 498; *Wager* v. *Troy Union R. R. Co.*, 25 N. Y. 526; *Perrin* v. *N. Y. C. R. R. Co.*, 36 N. Y. 120; *Wallace* v. *Fee*, 50 N. Y. 694; *Kings Co. F. Ins. Co.* v. *Stevens*, 87 N. Y. 287; *Matter of Ladue*, 118 N. Y. 213.)

The first of the deeds to which we call attention as covering the land in question is that of Hugh Williamson and others to Charlotte Vandenheuvel, dated November 30, 1802. It contains the recitals to which we have already called attention and then proceeds with the usual granting clause, for a consideration of one dollar, to quitclaim all the title and interest of the grantors to "all that certain lot of land situate in Bloomingdale in the seventh ward of the city and county of New York, distinguished by lot number six, beginning at a stake by the fence on the cross-road leading to Harlem, fifty links from the southeastern corner of the fence, thence running north 45° east parallel to the boundary fence ten chains sixty-five links to lot number five." The description then continues around the lot, returning on the westerly boundary "to the public road; thence south * * * along the road * * * to the place of beginning."

It will be observed that, under the recital to which attention has been called, this deed was executed under an agreement of the heirs of Apthorp to partition *all* his real estate among themselves, and that such partition had reference to the lands bounded upon the public road, or cross road as it is called, laid out through his farm. We think it is apparent that they intended that it should have the same force and effect as if made in court, and that they designed to divide among themselves all of the lands belonging to their ancestor. (*Mott* v. *Eno*, 181 N. Y. 346, 373.) In that case GRAY, J., says: "The complaint evidences a purpose to partition *all* of the estate, whether it consists in lots particularly described, or in an interest in the beds of the streets. There is nothing to justify an inference that the decree in parti-

tion left any property unpartitioned." But returning to the description, we find the beginning to be "at a stake by the fence on the cross road leading from Harlem fifty links from the southeastern corner of the fence." It will be observed that there is no specification of the fence by the side of which there was a stake. It was by a fence on the cross road Which fence? Lot number six, which the parties intended to convey as plotted, was upon the northerly side of the cross road. The stake is said to be fifty links from the southeastern corner of the fence. The southeastern corner of the fence of necessity was upon the other side of the road. The direction of the stake therefrom is not given. Its distance was fifty links. It is claimed on the part of the appellants that there was a mistake in the description in locating the corner of the fence as the southeastern corner. But this would involve the determination of a question of fact, and how can we, sitting as a court of review, limited in jurisdiction to the consideration of questions of law only, determine this fact? No evidence of a mistake has been given, and we are, therefore, left to determine from the description where the beginning point is located. In this regard we think the description is ambiguous, and we must, therefore, consider the description of the other lines for the purpose of determining the intent of the parties. Referring to the description we find that upon the western boundary it returns "to the public road and thence south along the road to the place of beginning," thus bringing the case within the authorities which require us to presume that the intention of the grantors was to convey the title to the center of the public road.

We have also examined the subsequent partition of this property forming the record chain through which the plaintiff herein claims title, made in 1830. It is true that, in the partition deed, the fourth course in the description is omitted, but this was given in the report made by the commissioners appointed to partition the premises, and their report was confirmed by the court. The omission was evidently an over-

sight. Conveyances subsequently made have included the course. It was as follows: "And thence easterly along said lane or road to the place of beginning." It is true that the commissioners in their report commenced the description as beginning on the northwesterly corner of Eighth avenue and a lane or road leading from the Bloomingdale road to Harlem commons, which lane or road forms the southerly boundary of the tract of land in question. It is apparent that Eighth avenue had been laid out and opened during the interval between 1802 and 1830, but we have in the partition the boundary returning to the lane or road, and thence along the lane or road similar to that found in the first deed to which we have called attention; and, therefore, under the rule to which we have referred in the case of *Mott* v. *Eno*, the intention was to include the fee of the road.

The next deed to which we call attention is that of Williamson and others to Ann Apthorp. It bears date the same day of that to Charlotte Vandenheuvel and contains the same recitals. It describes the land conveyed as distinguished upon the plat or map as lot number eight "beginning at a stake by the fence on the public cross road, the corner of Mr. Jauncey's land; thence running south," continuing the description by metes and bounds around the lot to lot number seven, "thence north 54° east seventeen chains and thirty links to the public road, thence north 53° 30′ west along the public road * * * to the place of beginning." It will be observed that the beginning point is "at a stake by the fence on the public cross road, the corner of Mr. Jauncey's land." The lot so intended to be conveyed was upon the southerly side of the cross road and is opposite to that conveyed to Vandenheuvel. Assuming that the stake referred to was at the fence on the southerly side of the road, yet if the lands conveyed to Jauncey ran to the center of the road the commencement would be at the corner of Mr. Jauncey's land and the stake by the fence would simply be a mark on the northern boundary of the line. However that may be, this being a partition deed in which, presumably, the heirs

intended to partition all of the property among themselves, the subsequent descriptions to the effect that the line returning ran to the public road and thence north along the public road to the place of beginning we think indicates an intention to convey the fee to the center thereof. This was evidently the understanding of the grantee Ann Apthorp, for, in her deed to Philip Brasher on March 13, 1807, while using substantially the same description, she states in addition thereto that the lands conveyed were bounded to the westward by the lands of James Jauncey, to the southward by the lands of Robert L. Bowne, to the eastward by the lands of Mrs. Shaw and to the northward by a public road, referring to the cross road in question. This is followed by numerous other conveyances forming the plaintiff's source of title.

The only other deed that it becomes necessary to consider is that of the Apthorp heirs to Jauncey, which was executed August 1, 1799, which conveys a tract of land westwardly of that embraced in lot seven. The description begins "at the corner of a field at the junction of the Bloomingdale Road with the Cross Road that leads to Harlem; thence running along the Bloomingdale Road south" to a point specified; thence continues with metes and bounds around to the place of beginning, giving quantity and providing "according to a map thereof made by Benjamin Taylor, one of the city surveyors of the said city of New York and hereunto annexed." While the map does not appear to be attached to this deed, it was proved and is in evidence, showing that the northern boundary of the Jauncey lot was bounded by the cross road in question. It thus appears that the boundary upon the northerly side was by the highway, thus bringing it within the rule to which we have called attention, where a deed gives the boundaries of the land conveyed by courses and distances without mentioning a street by which the same is bounded, where it turns out in fact that it was bounded by a street, the fee thereto will be deemed to be included.

It is contended, however, that the beginning point indicated a different intention. It was, as we have seen, at the

corner of the field at the junction of the Bloomingdale road with the cross road. It does not, however, appear that the field was fenced or that there was any visible monuments to locate the corner of the field. Without limiting words the commencing point would be deemed at the junction of the two roads, which would mean at the center thereof, and this would be strengthened by the fact that the line running therefrom was south along the Bloomingdale road, thus indicating an intention to convey to the center of the road. We are aware that a doubt as to the intention of the grantors was expressed in the opinion written in the case of *Holloway* v. *Delano* (139 N. Y. 412, 413). But the judgment was affirmed on another ground. Assuming, however, that there is a doubt as to the commencing point in the description, we are required under the rule to which attention has been drawn, in case of a doubt, to construe the description most favorably to the grantee, and taking into consideration the other lines of description, which in fact bound it upon the cross road, we think the fee thereto must be deemed to have passed to Jauncey.

It follows that the judgment should be affirmed, with costs.

GRAY, J. I shall agree with Judge HAIGHT'S conclusion that this judgment should be affirmed. I think it to be very clear that the claim of the appellants to be tenants in common with the Van Winkles of the premises in controversy is without adequate support in the facts and that it is beyond the rule of presumption. Williamson having acquired title under the sheriff's deed, in 1799, either his subsequent conveyances carried to his grantees the fee of the soil in the lane, or it remained in him and his heirs. The argument that a deed should be presumed from him to the Apthorp heirs is untenable. I do not understand that a conveyance will be presumed to create a title, but, only, to support a just title and to prevent its defeat. As TINDAL, C. J., stated the rule in *Doe* v. *Cooke*, (6 Bing. 174, 179), "no case can be put in which any presumption has been made, except where a title has

been shown by the party, who calls for the presumption, good in substance, but wanting some collateral matter, necessary to make it complete in point of form." The only case, as the same judge pointed out, would be where a possession had been shown, consistent with the fact to be presumed.

The question whether the description in the deeds suffices to convey the roadbed of the lane is not without its difficulty. In such cases, in seeking for the intention of a grantor, a certain latitude of inference is allowed, based upon the circumstances, as well as upon the language employed. We may consider the general facts, in connection with the legal presumption which obtains, in the absence of words necessarily excluding its operation, that a highway, or street, when referred to as a boundary, is to be regarded as a line and is, therefore, included to its center. There is nothing in this case to rebut the presumption against the grantor's intending to reserve to himself the title to the soil of this cross road, or lane, and there is much to favor it, as Judge HAIGHT has pointed out. Whether, as in the two deeds to Charlotte Vandenhuvel and Ann Apthorp, placing the point of beginning "at a stake by the fence" shall be controlling upon the question of the exclusion, or inclusion, of the bed of the boundary road is a question which I will concede to be dependent upon, and to be determined by, the running of the subsequent courses. The stake, as a monument for the survey, could not well be in the roadway. If there had been the intention to reserve the fee in the soil of the road, it would have been natural to place the point of beginning in the side of the road. The subsequent courses are run to, or along, the road and the conveyance is by reference to the Taylor map. These considerations, together with the further one of the intention of the Apthorp heirs to partition what there was of their estate, incline me to agree with the construction given by Judge HAIGHT.

The third deed of the Jauncey parcel underlies the title to a very small and irregular part, or gore, of the premises, varying from about one foot to one foot and a half in width. In view of our decision in the case of *Holloway* v. *Delano*, (139

N. Y. at p. 412), it is difficult to hold, without conflict, that the starting point of the description, "at the corner of the field at the junction of the Bloomingdale Road with the Cross Road that leads to Harlem," is not in the side of the road. It may be that the appellants have failed upon the trial to connect their claim of title with that derived by the Van Winkles, as the respondents argue; but I shall place my vote, upon this branch of the case, upon the proposition that the appellants can have no interest in this gore of land. The title to it, if not parted with in the Jauncey deed, remained in Hugh Williamson, who is shown to have been the owner of the whole Apthorp farm under the sheriff's deed, in April, 1799. If in August, following, he conveyed to the Jaunceys by a deed, in which the Apthorp heirs joined with him as grantors, his absolute title is not negatived by that circumstance. No conveyance from him to the Apthorps was shown and the only presumption permissible is that they were joined to quiet all questions of title. The Apthorps, clearly, as I think, had no interest in that portion of the lane and, hence, none could be derived by the appellants upon which to predicate their claim to a tenancy in common with the Van Winkles.

EDWARD T. BARTLETT, VANN and WILLARD BARTLETT, JJ., concur with HAIGHT, J.; GRAY, J. (in memorandum), concurs in result; CHASE, J., dissents on opinion below; CULLEN, Ch., J., absent.

Judgment affirmed.

SOLOMON L. PAKAS, Appellant, *v.* WILLIAM R. HOLLINGSHEAD et al., Respondents.

SALES — FAILURE TO DELIVER INSTALLMENTS AS AGREED, A BREACH OF ENTIRE CONTRACT — DAMAGES RECOVERABLE IN ONE, NOT SUCCESSIVE ACTIONS. Where the vendor of goods to be delivered and paid for in installments, refuses to deliver an installment, a breach of the entire contract is thereby established for which the vendee if he so elects may immediately recover all his damages; or he may wait until the expiration of the time for the delivery of all the goods and then recover; he cannot, however, split up his demand and maintain successive actions to recover

for each default as it occurs; and when he obtains a judgment for damages for the non-delivery of part of the goods, it is a bar to the maintenance of a subsequent action to recover for the failure to deliver the balance.

Pakas v. *Hollingshead*, 99 App. Div. 472, affirmed.

(Argued January 26, 1906; decided March 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 3, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph Fischer and *Louis J. Vorhaus* for appellant. The judgment in the City Court action is not a bar to the cause of action set forth in the complaint herein. (*Richmond* v. *D. & S. C. R. R. Co.*, 33 Iowa, 422; *Mixer* v. *Williams*, 17 Vt. 457; *Johnson* v. *Allen*, 78 Ala. 387; *Simpson* v. *Crippin*, L. R. [8 Q. B.] 14; *Freeth* v. *Burr*, L. R. [9 C. P.] 208; *M., etc., K. Co.* v. *Naylor*, L. R. [9 App. Cas.] 434; *Blackburn* v. *Reilly*, 47 N. J. L. 290; *Cohen* v. *Platt*, 69 N. Y. 348; *Nichols* v. *S. S. Co.*, 137 N. Y. 471; *Wharton* v. *Winch*, 140 N. Y. 287.)

Edmond E. Wise for respondents. The judgment in the action in the City Court, which awarded damages to the plaintiff for breach of contract, is a complete bar to this action. (*A. S. Co.* v. *Robinson*, 167 N. Y. 101; *Secor* v. *Sturgis*, 16 N. Y. 557; *Samuel* v. *F. & C. Co.*, 76 Hun, 308; 150 N. Y. 583; *Perry* v. *Dickerson*, 85 N. Y. 345; *Seed* v. *Johnston*, 63 App. Div. 347; *Howard* v. *Daly*, 61 N. Y. 362; *Parry* v. *A. O. Co.*, 19 Abb. [N. C.] 269; *Waldron* v. *Hendrickson*, 40 App. Div. 7; *Wieland* v. *Willcox*, 40 App. Div. 213; *Bassett* v. *French*, 1 Benj. Ann. Cas. 270.)

O'BRIEN, J. On the 30th of August, 1898, the defendants, by an executory contract in writing, agreed to sell and deliver to the plaintiff fifty thousand pairs of bicycle pedals, the goods

to be delivered and paid for in installments, as specified in the contract. It has been found by the trial court that the defendants delivered two thousand six hundred and eight pairs of pedals under the contract, and refused to make further deliveries. When the fact is established that the seller of goods to be delivered and paid for in installments, as in this case, refuses to deliver the goods, that amounts to a repudiation of the contract and a breach of it, for which the buyer may recover damages. So we start in this case with a breach of a contract on the part of the defendants by their refusal to be bound by its obligations.

It is found that on the 15th of March, 1899, the plaintiff commenced an action against the defendants in the City Court of New York for breach of this contract, in that they failed to deliver to the plaintiff the pedals which, by the terms of the agreement, the defendants were bound to deliver up to the first of March, 1899, to wit, nineteen thousand pair, of which the defendants had delivered only the two thousand six hundred and eight pairs, and had failed to deliver sixteen thousand eight hundred and ninety-two pairs, which were to be delivered up to the first of March, 1899. This action was put at issue, and after a trial the plaintiff recovered judgment against the defendants for the full amount claimed in the complaint in the action as damages for the breach of the contract, which judgment has been paid by the defendants in full.

Subsequently and in February, 1900, the plaintiff commenced the present action to recover damages for a failure to deliver the balance of the goods, and both parties have pleaded the former suit and judgment. The plaintiff claims that it is conclusive evidence in his favor with respect to the existence, validity, terms and breach of the contract, while the defendants interpose it as a bar to the present action. This situation presents the question of law involved in the case. Judgment was given at the trial court in favor of the defendants and this judgment was affirmed on appeal. The question of law arising upon these facts is whether the former judgment concludes the plaintiff and is a bar to a

second action to recover damages on the same contract. There can be no doubt that the contract was entire. It could not be performed on the part of the defendants without delivery of the property stipulated in the contract and the whole of it. As was said by Judge BRADLEY in *Brock* v. *Knower* (37 Hun, 609), the fact that the property was deliverable and the purchase money payable at different times in the future did not necessarily deprive the contract of the character of entirety or make it other than a single one in respect to all the goods embraced in its terms. The learned counsel for the plaintiff contends that the former judgment did not constitute a bar to the present action, but that the plaintiff had the right to elect to waive or disregard the breach, keep the contract in force and maintain successive actions for damages from time to time as the installments of goods were to be delivered, however numerous these actions might be. It is said that this contention is supported in reason and justice, and has the sanction of authority at least in other jurisdictions.

We do not think that the contention can be maintained. There is not, as it seems to us, any judicial authority in this state that gives it any substantial support. On the contrary, we think that the cases, so far as we have been able to examine them, are all the other way, and are to the effect that inasmuch as there was a total breach of the contract by the defendants' refusal to deliver, the plaintiff cannot split up his demand and maintain successive actions, but must either recover all his damages in the first suit or wait until the contract matured or the time for the delivery of all the goods had arrived. In other words, there can be but one action for damages for a total breach of an entire contract to deliver goods, and the fact that they were to be delivered in installments from time to time does not change the general rule.

This question arose in this state at an early day. In *Miller* v. *Covert* (1 Wend. 487) it was held that where a party brings an action for a *part* only of an entire and indivisible demand and obtains judgment in such action he cannot subsequently

avail himself of the *residue* by way of offset in an action against him by the opposite party.

It was held in the case of *Bendernagle* v. *Cocks* (19 Wend. 207) that where a party had *several demands or existing causes of action* growing out of the *same contract* or resting in *matter of account* which *may* be joined and sued for in the same action they *must* be joined; and if the demands or causes of action be split up and a suit brought for *part* only and subsequently a second suit for the *residue* is brought, the first action may be pleaded in abatement or in bar of the second action. That, it seems to us, is what has been decided in this case. The case referred to was elaborately discussed by Judge COWEN, and the English authorities on the subject cited and distinguished.

Colburn v. *Woodworth* (31 Barb. 381) was an action by an employee to recover *wages* under a contract to work for the plaintiff for three years from August 1st, 1857, payable quarterly, and damages for a breach of the contract by the defendant in discharging the plaintiff from his employment on the 26th day of December, 1857, without cause. The defendant pleaded and proved that in January, 1858, after the plaintiff was discharged, he commenced an action against the defendant, and in his complaint claimed one quarter's wages and damages for the wrongful discharge. The cause was referred and the referee reported in favor of the plaintiff for one quarter's wages, and the plaintiff had judgment on the report. Subsequently, the plaintiff brought another action for wages and damages, but the trial court held that the former judgment was a bar and granted a nonsuit. Judge JOHNSON, in delivering the opinion of the court, said: "There can be no doubt that the cause of action here alleged is in its nature indivisible. All the damages which the plaintiff could, under any circumstances, recover, were such as flow directly and necessarily from the breach, which is the sole cause of action. The contract is not in the nature of a continuing covenant, like a covenant running with land. It is idle to suppose that when such a contract has been once put an end to by one

party entirely, though without sufficient cause, and the other party has brought his action for the damage occasioned by such breach and had the judgment of the court upon his claim, the contract still remains in force so as to entitle such other party to the compensation provided for in case of its performance. When the action is brought to recover damages for a breach of that character it is necessarily an election on the part of the party presenting it to consider the contract at an end, so far, at least, as performance on his part is concerned. The action operates as a rescission by him as to further performance. If the party thus situated brings his action before the entire measure of damages has been filled or before the damages have all become known so as to be susceptible of proof it is his folly or misfortune. He cannot sever them and recover in one action and the residue, when discovered, in another." (*Schell* v. *Plumb*, 55 N. Y. 592.)

The English cases point to but two alternative remedies open to the buyer upon a breach of contract for the sale of goods to be delivered in installments. One is to sue upon repudiation for a total breach before the time for performance has arrived and the other is to await the time for full performance and then sue for the damages. No suggestion is to be found in any of the cases that I have observed, to the effect that the buyer had an option to bring successive actions as the time for the delivery of each installment matures. It is said in many of the cases that the injured party had an option, but that option was not to bring several successive actions, but to elect whether, upon a breach, he shall proceed to recover all his damages or to await the time for full performance. The cases in the English courts on this question are very numerous, but they were all reviewed and the rule approved and followed in the case of *Roehm* v. *Horst* (178 U. S. 1), where it was held that the English rule was reasonable and just.

We are unable to see how the contention of the learned counsel for the plaintiff can be reconciled with the case of *Samuel* v. *Fidelity & Casualty Co.* (76 Hun, 308, which was

affirmed in this court on the opinion below, 150 N. Y. 583). Other cases in this court seem to us to be entirely adverse to the plaintiff's contention. (*Howard* v. *Daly*, 61 N. Y. 362; *Nichols* v. *Scranton Steel Co.*, 137 N. Y. 471.) The cases bearing upon this question have been very fully collated in 2 Black on Judgments (§ 734), where the rule is stated in these words: "When a demand or right of action is in its nature entire and indivisible it cannot be split up into several causes of action and made the basis of as many separate suits, but a recovery for one part will bar a subsequent action for the whole, the residue or another part. * * * If it appears that the first judgment involved the whole claim or extended to the whole subject-matter, and settled the entire defense to the whole series of notes or claims, and adjudicated the whole subject-matter of a defense equally relevant to and conclusive of the controversy between the parties, as well in respect of the claim or defense in judgment as in respect to other claims and defenses thereto, pertaining to the same transaction or subject-matter, then the first judgment operates as an estoppel as to the whole." (Ibid, § 751; *Bouchaud* v. *Dias*, 3 Denio, 238.)

It is elementary law that a former judgment is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. (*Cromwell* v. *County of Sac*, 94 U. S. 351.)

It was admitted upon the argument of this case, and is admitted upon the brief of plaintiff's counsel, that the plaintiff could have recovered all his damages for a breach of the whole contract in the first action. The only contention is that he was not obliged to do so but could maintain as many other actions as there were deliveries provided for in the contract in case of default. It does not seem to us that this proposition can be supported in reason or upon authority. The plaintiff claims in this action that the former judgment was conclusive as to him, that is, that it cuts off the defend-

ants from any defense which they might originally have made, and thus it is sought to make this case an exception to the general rule that estoppels must be mutual; that is, that in general if the judgment is binding on one party it is equally binding in its effect upon the other. I think it would not be wise to engraft such a distinction upon the law of this state as was said in the case of *Sykes* v. *Gerber* (98 Pa. St. 179): "The law does not tolerate a second judgment for the same thing between the same parties, whether the claim is upon a contract or tort. * * * The general rule is that it is against the policy of the law to permit a plaintiff to prosecute in a second action for what was included in and might have been recovered in the first, because it would harass the defendant and expose him to double costs." (*Guernsey* v. *Carver*, 8 Wend. 492.)

We think the judgment below was right and should be affirmed, with costs.

CULLEN, Ch. J. (dissenting). I dissent from the decision about to be made. I concede to the fullest extent the principle that the plaintiff cannot split up a single cause of action, and that if he does a recovery on any part of the cause of action bars a suit for the remainder. I also concede the principle that in an executory contract for the sale of a number of articles or of a quantity of material, to be delivered in installments and payment made therefor as delivered, in the case of a breach by either party as to one of the installments the other party may elect to treat the default as a complete breach of the contract, and maintain a suit for all his damages. I further concede that where there have been several breaches of a single contract the plaintiff must include in his action all breaches which have occurred prior to the commencement of the action. But I insist that none of these principles controls the question before us, which is not whether the plaintiff upon the default in the delivery of the first installment of pedals could rescind the contract as having been abrogated by the act of the defendant, reserving his right to recover damages, but whether he was obligedto adopt

that course. Had he not as the aggrieved party the option to treat the contract as still continuing in force and, therefore, assert his right to recover damages for each default as it might occur? There can be no question that there may be a continuous agreement or covenant for every breach of which a new cause of action arises. Such is a covenant to maintain and repair a gate across a right of way. (*Beach* v. *Crain*, 2 N. Y. 86.) There it was held that a recovery for one breach did not bar an action on a subsequent breach, and it was said that the defendants could not relieve themselves from subsequent obligations by payment of a gross sum as damages. There are many cases of a similar character. Where the obligation is for the payment of money in installments the obligee has not, on default in the payment of one installment, even a right to elect to treat the contract as entirely broken, but must sue for the installments as they become due, unless the contract gives him the right of election. Where such an election is given by the contract, as is now quite common in the case of bonds and mortgages, the obligee is not bound to exercise it, but may do as he pleases. Therefore, to hold that the aggrieved party to a contract of the character of the one before us is not bound to accept a single breach of the contract as a total repudiation of its obligations, but can sue for each breach as it occurs, creates no anomaly in the law, and I can find no case where it has directly been held that he cannot. As I read them, in none of the cases cited by my brother O'BRIEN, except those relating to contracts of employment, was the question before us involved. They all present the question as to the right of an aggrieved party on a single breach to recover as for a total abrogation of the contract, not the question whether he is obliged so to do. In fact, in most of the cases it is said that the aggrieved party may elect to treat the contract as abrogated. An election necessarily imports a right of choice. The question not being settled by authority should be determined on principle. Why should it be within the power of a party to a contract which may last over a long

term of years, and the items or obligations of which are easily severable, to transmute by his own wrong his contract obligations into an unliquidated claim of damages against him, damages which as far as the future obligations of his contract are concerned are necessarily speculative. A person being about to contract for the construction of some work the execution of which will require a long period of time needs, to carry out the contract, brick, stone or steel, and to secure himself against subsequent fluctuations in the market price of these articles, which he may believe will be greatly enhanced in price in the future, contracts with a materialman for their delivery in installments. It is by no means improbable that he has paid more than the present market price solely by reason of the uncertainty of the market price in the future. Under the decision about to be made he must either sue at the time of the first breach, when his damages will necessarily be speculative, a speculation it was the very object of the contract to avoid, or perhaps wait till the time for the last delivery has passed, when it may be that under the doctrine now declared his cause of action would be barred by the Statute of Limitations. As was said by Judge ANDREWS in *Perry* v. *Dickerson* (85 N. Y. 345): "The law, to prevent vexatious or oppressive litigation, forbids the splitting up of one single or entire cause of action into parts, and the bringing of separate actions for each. * * * There can be but one recovery for an injury from a single wrong, however numerous the items of damage may be, and but one action for a *single breach* of a contract * * * But it is not a test of the right of a plaintiff to maintain separate actions that all the claims might have been prosecuted in a single action. A plaintiff having separate demands against a defendant on a contract, or arising from distinct trespasses or wrongs, is not required to combine them in one action, although in most cases he may do so at his election." So it was held that a demand for unpaid wages and for wrongful dismissal, though both breaches of the same contract, did not constitute a single cause of action and that a judgment for damages for wrong-

ful dismissal did not bar a claim for unpaid wages. Nor is our decision in *Nichols* v. *Scranton Steel Company* (137 N. Y. 471) controlling. It was there said: "If it were not for a repudiation of the contract nothing could be recovered as damages for the iron not delivered, because by the terms of the contract such delivery and payment would not be due, but when the defendant does repudiate the contract and refuses on its part to fulfill its terms, it cannot be heard to say that the other party must himself be bound by it, and must await the expiration of the term of credit provided for by it before any action can be maintained under it." This is doubtless true. It does not lie in the mouth of the defaulting party to say that the contract is still in force; but how about the aggrieved party? May he not say the contract is still in force? Of course, where a party sues for damages for only a single breach of a contract, he elects to continue it in force. Therefore, he must live up to the future obligations of the contract and cannot justify a subsequent breach on his part by the previous breach on the part of the other party. But whether the contract shall be continued in force or shall be rescinded seems to me should be entirely within the election of the aggrieved party.

So in *Parker* v. *Russell* (133 Mass. 74), where the defendant had agreed to support the plaintiff during his natural life and refused to do so, it is said: "But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, *and he elects to so treat it*, the damages are assessed as of a total breach of an entire contract." This statement is quoted with approval by the United States Supreme Court in *Pierce* v. *Tennessee Coal, etc., R. R. Co.* (173 U. S. 1.) Thus the right of election in the aggrieved party is recognized.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ., concur with O'BRIEN, J.; CULLEN, Ch. J., reads dissenting opinion.

Judgment affirmed.

In the Matter of the Proceedings for the Disbarment of ARTHUR E. CLARK, an Attorney and Counselor at Law, Appellant.

FRANK O. BAILEY, Respondent.

1. CHAMPERTY — EMPLOYMENT OF LAYMAN BY ATTORNEYS TO PROCURE CLIENTS A MISDEMEANOR AND WARRANTS FORFEITURE OF OFFICE. Section 74 of the Code of Civil Procedure, prohibiting attorneys or counselors from procuring retainers by offering or giving any valuable consideration therefor, not only prohibits them from giving it to a desired client for the purpose of obtaining his claim to bring suit upon, but also from paying or agreeing to pay any layman, out of the prospective profits of cases, for services in inducing desired clients to place their claims in the attorneys' hands for enforcement; such conduct is champertous and subjects the offending attorney to punishment as for a misdemeanor and also to removal from his office. (§ 75.)

2. MALPRACTICE — CODE CIV. PRO. § 67. An attorney who, in order to secure his own compensation, settles with the party against whom he has been retained to enforce claims, assigns his contracts of retainer, and notifies his clients to settle directly with such party, agreeing that to the extent of his ability he will facilitate any settlement that the latter may desire to make, is guilty of malpractice under section 67 of the Code of Civil Procedure.

Matter of Clark, 108 App. Div. 150, affirmed.

(Argued January 10, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 11, 1905, confirming the report of a referee and directing the removal of the appellant herein from the office of attorney and counselor at law.

This proceeding is based upon eleven charges of misconduct preferred by Frank D. Bailey, of Syracuse. The appellant interposed an answer and the matter was referred to the Hon. Charles A. Hawley, of Seneca Falls, to take the proofs therein and report the same to the Appellate Division, together with his opinion thereon. The referee reported that eight of the charges had been fully established by the evidence, but as to three others (those numbered VI, VII and XI), while they

were proved to be true in fact, the facts thus proved did not constitute wrongful conduct on the part of the attorney. The Appellate Division confirmed the referee's report and made the order of disbarment from which the present appeal is taken.

Adelbert Moot, *William C. Watson* and *Arthur E. Clark* in person for appellant. The facts alleged, proved and found do not constitute champerty. (*Sedgwick* v. *Stanton*, 14 N. Y. 289; *Coughlin* v. *N. Y. C. & H. R. R. R. Co.*, 71 N. Y. 74; *Hirschbach* v. *Ketchum*, 5 App. Div. 324; *Matter of Fitzsimons*, 174 N. Y. 22.) The settlement of Mr. Clark, and getting counsel fees or costs, do not constitute cause for disbarment within section 67 of the Code of Civil Procedure. (*Lytle* v. *Crawford*, 69 App. Div. 273.)

Bayard J. Stedman, *Seldon S. Brown* and *Frank E. Young* for respondent. The agreements with Snell that he should secure contracts from third persons authorizing Clark to proceed to bring actions on the claims, and that the proceeds should be divided between the defendant and Snell, constituted champerty. (Code Civ. Pro. § 74; *Hirschbach* v. *Ketchum*, 5 App. Div. 324.) The finding of the referee that Clark settled with the Central New York Telephone and Telegraph Company; assigned his retainers to the general manager of the company; received the sum of $3,000, and appropriated the same to his own use, except such amount as he turned over to his agent Snell, and that by so doing he committed a fraud upon each of his clients, was sufficient to warrant the order of disbarment. (Code Civ. Pro. § 67.)

WILLARD BARTLETT, J. This is a melancholy case, resulting in the destruction of the professional career of an educated lawyer who for many years appears to have enjoyed an excellent reputation and the general esteem of the community in which he has lived. It demands and it has received the most scrupulous and careful attention of the courts in

considering the evidence offered in support of the charges and the proper and necessary inferences to be drawn from the proof. The essential facts are uncontroverted, and they lead unquestionably to the painful conclusion that the appellant ought not to be allowed to practice law any longer.

I do not propose to discuss in detail the evidence which has convinced the referee and the Appellate Division of the truth of all of the eight charges which they have declared to be established; but as to two of them, there are reasons why some observations may well be added to what was said in the court below.

The fifth charge involves an accusation of champertous conduct, in violation of the provisions of section 74 of the Code of Civil Procedure, and the proper construction and application of that section are subjects of great interest and practical importance to lawyers throughout the state. The tenth charge, which is practically a charge of selling out his clients, presents so clear a case of premeditated moral turpitude in his professional relations, on the part of the appellant, that a brief consideration of the proof by which it is sustained will suffice to demonstrate that no injustice would have been done if his disbarment had been based upon that charge alone.

The fifth charge is as follows: "That in or about the years 1896 and 1897 the said Arthur E. Clark entered into certain contracts with one Charles A. Snell, by the terms of which he employed the said Snell to procure persons throughout the State of New York to retain and employ said Clark to commence actions against different telephone and telegraph corporations, and in and by said contracts the said Clark promised and agreed to pay said Snell for inducing said persons to place such claims in his hands for collection and for the purpose of bringing actions thereon; that, in pursuance of said contract, the said Snell did procure persons to the number of over two thousand to employ said Clark as attorney as aforesaid; and that said Clark paid to said Snell large sums of money on account thereof; that said contracts were in viola-

tion of sections 74 and 75 of the Code of Civil Procedure of the State of New York."

The referee reported to the Appellate Division that in his opinion the proofs abundantly sustained this charge. In 1896 Mr. Clark entered into an oral agreement with Mr. Charles A. Snell, who was not an attorney, whereby Snell undertook to induce persons having claims against telegraph and telephone companies on account of the erection of poles in the highways upon which they owned lands to place such claims in the hands of Clark for prosecution. Clark agreed to pay Snell three dollars, and subsequently five dollars for each claim so procured. Snell obtained about one hundred claims at three dollars, and about three hundred at five dollars. Then Clark and Snell entered into the following contract in writing:

"It is agreed by and between Arthur E. Clark and C. A. Snell both of Batavia, Genesee County, New York, that said Snell shall work for the said Clark in getting telephone and telegraph contracts in the same manner as he has done heretofore, and that said Clark agrees to pay him one-half of the proceeds realized by said Clark on account of said claims; said Snell is to pay his own expenses while he is out soliciting the said claims; said Clark is to pay his own expenses while he is out settling, and in case said Snell goes out to settle them, said Clark is either to pay said Snell's expenses while he is out or said Clark is to see that said Snell's expenses are paid by the company or companies. Said Clark is to have the right to hire other men to do the same work provided he cares to do so. Said Snell is to have the right to employ men to work under him, but said Clark is to have the same share in the proceeds of their work.

"Dated *February 22nd*, 1897.

"ARTHUR E. CLARK.
"C. A. SNELL."

For use by Snell under this contract a printed blank for the retainer was prepared, for execution by Mr. Clark and the

land-owner in each case, when the blanks were filled out, in which provision was made for specifying the land-owner's claim for damages at so many dollars per pole, so many dollars for mutilating shade trees and so many dollars for mutilating fruit trees, and whereby Clark agreed to accept from the land-owner ten per cent of the damages recovered from the company to be proceeded against, in full compensation for his services. In some cases the stipulated compensation was more than ten per cent. About two thousand claims were obtained by Snell and his agents under this contract and turned over to Clark, who paid Snell a large sum of money in the aggregate for his services in procuring the same. Most of the claims appear to have been settled without suit, although the referee reports that suits were brought upon some of them.

Upon these facts, as to which there is no substantial dispute, the question of law is whether Mr. Clark can be deemed to have violated section 74 of the Code of Civil Procedure. To quote the language of his learned counsel upon this appeal: "It is claimed that it is champerty for a lawyer to hire a local collector and an insurance agent, like Snell, to visit farmers and get their written contracts authorizing an attorney like Mr. Clark to bring actions of ejectment for them, with an agreement to give the attorney from ten to thirty per cent of the amount collected in such actions." He denies that such conduct on the part of an attorney is forbidden by the laws of this state, and it is now incumbent upon this court directly to decide whether it is or not.

Champerty, under the law of England, was an agreement to assist another in prosecuting a suit in consideration of receiving a share of the sum or property recovered. As recently as 1873 it was defined by BLACKBURN, J., as "a bargain whereby the one party is to assist the other in recovering property and is to share in the proceeds of the action," and was declared to be illegal under the English law. Blackstone makes it an element of the offense that "the champertor is to carry on the party's suit at his own expense" (4 Blackst. Com.

135), but this is not the uniform view of the writers on elementary law as was pointed out by the Supreme Judicial Court of Massachusetts in *Lathrop* v. *Amherst Bank* (9 Metc. 489, 492).

Whatever may have been the law of champerty in this state prior to that time, it became wholly comprised in the Revised Statutes upon their enactment in 1827 and 1828. Judge SAMUEL L. SELDEN, writing for this court in 1856, said that "not a vestige of the law of maintenance, including that of champerty, now remains in this State except what is contained in the Revised Statutes." (*Sedgwick* v. *Stanton*, 14 N. Y. 289, 301.)

These provisions of the Revised Statutes material to the present discussion were as follows:

"§ 72. No attorney, counsellor or solicitor, by himself, or by or in the name of any other person, either before or after suit brought, shall lend or advance, or agree to lend or advance, or procure to be lent or advanced, any money, or any bond, bill of exchange, draft or other thing in action, to any person, as an inducement to the placing, or in consideration of having placed, in the hands of such attorney, counsellor or solicitor, or in the hands of any other person, any debt, demand or thing in action, for collection.

"§ 73. Every attorney, counsellor or solicitor, who shall violate either of the two last preceding sections, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine or imprisonment, or both; and he shall also be removed from office in the several courts in which he is licensed." (2 Rev. Stat. 288, §§ 72, 73.)

The effect of these sections upon contracts between attorney and client was considered in *Coughlin* v. *N. Y. C. & H. R. R. R. Co.* (71 N. Y. 443, 452) in the light of the language of section 303 of the then existing Code of Procedure, providing that "all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, and all existing rules and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor

or counsel for his compensation are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties." Referring to the sections of the Revised Statutes which have been quoted, Judge EARL declared that they had not been abrogated by the above provision from the Code and went on to say:

"These sections of the Revised Statutes and the Code are in perfect harmony. An attorney may stipulate with his client for any compensation they may agree upon, and such compensation may be absolute or contingent; but he may not purchase a claim for prosecution, and he may not advance, or agree to advance, any money for the purpose of inducing a party to place a claim in his hands for collection. Now what was done here? One of the attorneys went to the plaintiff, and, for the purpose of inducing him to place the claim in his hands for prosecution, agreed not only to render the services, but also to advance all the money needed to carry on his suit. This, within the meaning of the statute, was an agreement to advance money to the plaintiff. The agreement was a plain violation of the statute, and if such agreements are allowed the purpose of the statute would be in a great degree defeated."

In 1876 the legislature transferred into the Code of Civil Procedure the substance of sections 72 and 73 of 2 Rev. Stat. 288, now to be found embodied in that Code as follows:

"§ 74. An attorney or counsellor shall not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or the hands of another person, a demand of any kind, for the purpose of bringing an action thereon. *But this section does not apply to an agreement between attorneys and counsellors, or either, to divide between themselves the compensation to be received.*

"§ 75. An attorney or counsellor, who violates either of the last two sections, is guilty of a misdemeanor; and, on convic-

tion thereof, shall be punished accordingly, and must be removed from office by the Supreme Court."

The last clause of section 74, which has been placed in italics, was not in the section as originally enacted, but was added by chapter 542 of the Laws of 1879.

Section 136 of the Penal Code provides that an attorney or counselor who violates "section 74 of the Code of Civil Procedure relating to certain promises and gifts," is guilty of a misdemeanor.

As construed by the learned Appellate Division the agreement between the attorney and the lay agent whom he employed to procure retainers for him contemplated the payment of the agent out of the profits to be derived by the attorney in the prosecution of the claims. The statute forbids the promise or gift of a valuable consideration to any person as an inducement to placing a claim for prosecution in the hands of an attorney. The effect of the decision below is to hold that section 74 of the Code of Civil Procedure not only prohibits a lawyer from offering or giving any valuable consideration to a desired client for the purpose of obtaining his claim to bring suit upon, but also forbids the lawyer from paying or agreeing to pay any layman out of the prospective profits of the case for services in inducing a desired client to place his claim in the attorney's hands for enforcement. In behalf of the appellant it is contended that this construction is incorrect and that the section seeks only to prohibit the offer or gift from an attorney to *the person having the claim* — that is to say, to the desired client — as an inducement to the retainer. These are radically different views and upon that which this court shall adopt depends the disposition of this branch of the present case.

The cases relied upon to support the determination of the Appellate Division are *Hirshbach* v. *Ketchum* (5 App. Div. 324) and *Irwin* v. *Curie* (171 N. Y. 409). In the first of these cases it appeared that the plaintiff (who was not shown to be an attorney) procured the employment of the defendant (who was an attorney) by a certain firm, to prose-

cute claims in their behalf, in consideration of receiving fifty per cent on the recovery; and that the defendant had agreed to pay to the plaintiff one-half of the compensation which he should thus become entitled to receive as attorney. This contract was declared by the Appellate Division of the first department (speaking through RUMSEY, J.) to be precisely within the prohibition of the statute (section 74 of the Code of Civil Procedure). "It appears necessarily from the allegations of the complaint," said Mr. Justice RUMSEY, "that he [the defendant] is an attorney and that the plaintiff procured his employment for the purpose of prosecuting and recovering certain claims. The thing which the statute forbids is to procure one's employment for the purpose of bringing an action upon a claim or demand."

In *Irwin* v. *Curie* (171 N. Y. 409) the contract was between a layman and an attorney and provided that the layman was to procure the attorney to be employed by certain importers to prosecute their claims against the United States government, upon contingent fees of fifty per cent which were to be equally divided between the layman procuring the employment and the attorney prosecuting the claims. The layman sued the attorney for his half of the contingent fees under the agreement. The Appellate Division in the second department held that he could not recover because the contract was in violation of section 74 of the Code of Civil Procedure and the parties stood *in pari delicto* (56 App. Div. 514). In this court the judgment of the Appellate Division was reversed solely on the ground that the prohibition of section 74 of the Code of Civil Procedure is directed against the attorney alone and, therefore, the parties did not stand *in pari delicto*. The discussion in the opinion of Chief Judge PARKER does not question the correctness of the decision below to the effect that the statute forbade the payment of money by a lawyer to a lay agent to procure claims for the lawyer to prosecute, and clearly assumes that proposition to have been correctly decided. Thus, he says (171 N. Y. page 412): "It will be observed that this statute does not provide that

such a contract shall be wholly void, nor does it in terms purport to operate upon a layman who may be persuaded to procure business for an attorney because of the latter's promise to divide the profits with him. Its prohibition is directed against the attorney and counselor, who is an officer of the court, and the very next section (75) provides that 'an attorney and counselor who violates either of the last two sections is guilty of a misdemeanor.' Here again we note that the penalty inflicted is upon the attorney and counselor alone and not upon his accomplice or possibly intended victim."

In these three decisions, then, two in the Supreme Court and one in the Court of Appeals, we have a distinct recognition of the applicability of section 74 of the Code of Civil Procedure to a case in which the attorney pays money, not to a claimant, to procure a retainer from him, but to a lay agent to exert his influence upon the claimant to induce the latter to employ the attorney. In *Irwin* v. *Curie* (*supra*) the Court of Appeals did not question the correctness of the decision of the Appellate Division in this respect. I participated in that decision, and I am not convinced that it was in this respect incorrect. *Matter of Fitzsimons* (174 N. Y. 15) decides nothing to the contrary. There, the agreement under consideration was one whereby the attorney was to be paid one-half of the money which should be realized in the proposed litigation, out of which he was to compensate another attorney associated with him in the case. This was held not to be champertous under the Code. "Under section 74," said MARTIN, J., "an attorney may agree upon his compensation, his agreement may be contingent upon his success and payable out of the proceeds of the litigation, and such contracts are not illegal but are continually enforced. With the question whether the statute permitting such contracts is wise or otherwise we have nothing whatever to do. Such is the law and if the agreement made by the appellant is within its protection it is valid and it is the duty of the courts to enforce it." These observations do not help the appellant here. His counsel, however, quotes the following passage, which occurs further on, in

Judge MARTIN's opinion in the *Fitzsimons* case, as bearing upon the question under discussion:

"The contract in no respect induced or protracted the litigation. The appellant stirred up no strife, induced no litigation, but merely agreed to take for the compensation of himself and his associate who was present at the time of the agreement and presumptively consented to it, one-half of the recovery, to be divided between them as they should agree. The contention that this agreement was within the prohibition of section 74 and therefore void, cannot, we think, be upheld."

I think this passage has a significance which is unfavorable rather than favorable to the construction of the statute contended for by the appellant. It assumes that *the statute was intended to prevent the promotion of litigation;* and if such be its purpose that purpose could hardly be accomplished more effectively than by prohibiting attorneys from employing paid agents to find claims for them to prosecute.

"The compensation of an attorney or counselor for his services is governed by agreement express or implied, which is not restrained by law." (Code Civ. Pro. § 66.) Citing this section as his authority, the learned counsel for the appellant argues that "the statute leaves Mr. Clark as free as the winds to thus hire persons upon commission or otherwise to go out and get contracts of retainer, provided always they do not give or promise any inducement of any kind to the person from whom they get them." But section 66, while providing that the agreement between an attorney and client as to the former's compensation is not restrained by law, does not provide that the methods whereby such agreement is obtained by the attorney are not subject to legal restraint. On the contrary, such methods are distinctly limited by section 74, as indeed is conceded by the argument which has been quoted, in so far as it admits that the offer or gift of a valuable inducement by the attorney to the desired client would be champertous. But section 74 prohibits such offer or gift "to any person," and it seems to me that it would be judicial

legislation, in view of the intent of the enactment, to limit the phrase so as to read, "to any person owning the demand to be sued upon."

It is said that the law permits attorneys to solicit business, and hence that there is no valid reason why they should not be permitted to pay agents to solicit business for them. But for nearly a century the law has prohibited them from obtaining retainers by offering or giving any valuable inducement whatever to the desired clients themselves, for the plain reason that such conduct tends to stir up litigation which might not otherwise arise and because needless litigation has always been deemed a public evil. It is equally manifest that the employment of paid agents has the same tendency. Where, as in the case at bar, the remuneration of the agent depends upon the number of retainers he procures, the strongest motive exists on his part to incite the assertion and prosecution of claims that might otherwise never be heard of. Nor is there anything in the suggestion that the employment of such paid emissaries is essential to the protection of the poor, who else might not become aware of their right to prosecute remedies in the courts for wrongs which they may have suffered. The permission which the law now gives to attorneys to serve clients for a contingent fee is sufficiently well known throughout the community to enable any one, however limited his means, to secure adequate professional service in the enforcement of any meritorious claim in the courts. It is not necessary for the protection of the poor to sanction the practice which, as applied to negligence cases under the name of "ambulance chasing" has brought deserved discredit upon those engaged in it; and in any event, if the views which have been expressed are correct, the law denounces the practice as criminal.

The tenth charge, upon which the order of removal is founded in part, reads as follows: "That, among the claims secured to be placed in the hands of the said Arthur E. Clark for collection, or suit, were a large number of claims against the Central New York Telephone and Telegraph Company.

That said Clark presented said claims to said company and settled the same upon receipt from said company of the sum of three thousand dollars, all of which he appropriated to his own use, except such sums as he turned over to the said Charles A. Snell for procuring him to be retained by the several claimants. That, by so doing, the said Arthur E. Clark committed a fraud against each of the several clients and persons represented by him, and who had claims against said telephone company."

Having secured through the agency of Snell, under the contract of employment already set forth, upwards of three hundred claims against the Central New York Telephone and Telegraph Company, the appellant appears to have had an interview in regard to them with a representative of the corporation, after which he wrote to the general manager the following letter:

"BATAVIA, N. Y., *March* 1, 1898.

"Mr. C. A. NICHOLSON,

"*Gen. Mgr., Central New York Telephone Co.*,
Auburn, N. Y.:

"DEAR SIR.— As the result of our conversation in Rochester I make you the formal proposition in regard to the cases I now have against your company.

"1. You are to pay me $25 for each case I now have against your company, and which you settle under the terms of our agreement.

"2. You are to have the privilege of settling them at your own terms and figures as far as possible.

"3. I am to write conciliatory letters to all who write asking about settlements, and to aid in every way possible in making these settlements, but I am to retain my hold over my clients as far as possible so that they will not go to other attorneys.

"4. Payments to be made as follows to me: $1,000 within ten days from date; $500 within three months; $500 within six months.

"6. A settlement to be made at the end of the year, in which

your company is to give me the name of each case arranged, and you are to pay me the balance due on the cases settled. We will then arrange a plan for settling the balance. This is about the way I think the matter had better be adjusted. I may tell you that the Empire State people have arranged their cases on this basis, and that they have been settling them so that neither they nor I have had any trouble. I have written and do write to my clients every few days telling them they had better settle if the company is disposed to do what is fair, and either I hear nothing from them or sometimes my clients write that they have settled.

"Believe me very truly yours,

"ARTHUR E. CLARK.

"P. S. Of course you understand the necessity of not showing this letter or letting the contents be known."

After some further negotiations the appellant and Snell addressed the following communication to the manager of the telephone company:

"BATAVIA, N. Y., *Aug. 29th*, 1898.

"Mr. C. A. NICHOLSON, *Gen. Mgr.*,

"*Central New York Tel. & Tel. Co.*,

"Utica, N. Y.:

"DEAR SIR.—Mr. Snell and myself make you the following offer in regard to the settlement of the claims we have against your company:

"You are to pay me in all three thousand dollars. Fifteen hundred dollars at the time this agreement is made and one-half the balance when fifty per cent of the claims are settled and within one year from date.

"The balance of the money to be paid within two years from date and when seventy-five per cent of the claims are settled.

"The payment of fifteen hundred dollars to be made on or before September 1, 1898.

"I am to help you in the settlement of these cases as far as I am able and yet keep my clients with me.

"That is it will not do for me to say or do anything that will drive them away. And neither Snell nor myself are to take any more claims against your company or to foster any litigation against it.

"Yours very truly,
"ARTHUR E. CLARK,
"C. A. SNELL."

This offer appears to have been accepted, and on September 9, 1898, the appellant received $1,000 from the treasurer of the telephone company, and $2,000 more was subsequently paid. The appellant under date of July 23, 1901, executed a paper purporting to be an assignment to the general manager of the telephone company personally "of all my right, title and interest of every kind and description in and to the contracts I have with the various land-owners against the Central New York Telephone and Telegraph Company for damages through the erection of poles, trimming trees, etc." Annexed to this paper were the names of the parties from whom the appellant had obtained the contracts of retainer.

The referee finds that the telephone company thereafter settled with only twenty-two out of the three hundred clients of the appellant.

The character of this transaction cannot be better stated than by quoting the language of the learned referee where he says:

"Thus it appears, first, that Clark settled with the company for his own compensation and turned his clients over for settlement to the very company as against which he had been retained to enforce settlement. And not only that, but agreed to facilitate to the extent of his ability the settlement which the company might desire to make and ultimately actually transfer to the company the contracts and retainers which he had taken against it. In other words, after securing for himself a large amount of money, he deliberately threw over to the enemy and abandoned his clients, and later transferred to the hostile party the retainers which he had procured to enable him to enforce his clients' right against it. I cannot

conceive of a more complete abandonment and overthrow of his clients by a lawyer, and I am persuaded that this transaction as to each of his clients was a fraud of the most reprehensible character."

In addition to this it may be observed that an assignment by the attorney for a claimant of his contract of retainer to the very party whom he has been retained to sue is a new and remarkable curiosity in the law, irrespective of the moral aspects of the transaction.

There cannot be any doubt, I think, that the evidence establishing this tenth charge makes out a case of malpractice within the meaning and intent of section 67 of the Code of Civil Procedure.

There was no error prejudicial to the appellant in any of the rulings of the referee to which our attention has been called; his conclusions are amply supported by the proofs; and the order of disbarment should be affirmed.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN and WERNER, JJ., concur; HISCOCK, J., not sitting.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JACOB HÜTER, alias MICHAEL BRUSCH, Appellant.

1. MURDER — ERRONEOUS INSTRUCTIONS AS TO KILLING AFTER THE COMMISSION OF A BURGLARY HAD CEASED — PENAL CODE, § 183. Where it appears upon the trial of a defendant indicted for murder in the first degree for killing a police officer, who was attempting to arrest him, that defendant, while attempting to commit a burglary was discovered by a private watchman; that, abandoning the property which he had stolen, he ran from the building pursued by the watchman until they were seen by a policeman who took up the pursuit, calling upon defendant to stop or he would shoot; that after following him for about three hundred feet the policeman had so gained upon the defendant that he was but a few feet distant from him when the latter suddenly drew his revolver and shot the policeman, producing a wound from which he died, it is reversible error to instruct the jury that in case the defendant did not intend to kill the policeman and that the killing was without premeditation, yet if they found that he fired the shot at the policeman after he had

attempted to burglarize or had burglarized the premises described in the indictment and was attempting to escape therefrom, then the verdict ought to be for murder in the first degree; since, at the time of the killing the defendant had ceased to be engaged in the commission of a burglary. (Penal Code, § 183.)

2. MURDER AS IN THE COMMISSION OF A FELONY — PENAL CODE, § 218, SUBD. 5. Nor is a conviction for murder in the first degree, as in the commission of a felony, warranted by the fact that at the time of the killing the defendant was engaged in the commission of another felony, *i. e.*, an assault upon an officer to prevent or resist the apprehension of himself (Penal Code, § 218, subd. 5); since the assault being the gist of the offense becomes a constituent part of and is merged in the homicide, and cannot be regarded as a separate and independent felony, which although committed "without a design to effect death," would bring the case within the statute.

(Argued January 11, 1906; decided March 13, 1906.)

APPEAL from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered May 20, 1904, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

Meyer Levy and *Samuel Meyers* for appellant. The court committed reversible error in its charge to the jury. (Penal Code, § 183, subd. 1; *People* v. *Barberi*, 149 N. Y. 256; *People* v. *Sullivan*, 173 N. Y. 122; *People* v. *Young*, 40 Misc. Rep. 256.)

William Travers Jerome, *District Attorney* (*Howard S. Gans* of counsel), for respondent. The defendant did not cease to be engaged in the commission of a felony simply because he had left the premises in which the felony was being committed. (2 Hawkins Pleas of the Crown, ch. 46, § 197, subd. 10; *People* v. *Conroy*, 97 N. Y. 62; *People* v. *Willett*, 102 N. Y. 251; *People* v. *Jackson*, 182 N. Y. 66; *People* v. *Sullivan*, 173 N. Y. 122; *People* v. *Dolan*, 64 N. Y. 485; *People* v. *Meyer*, 162 N. Y. 357; *Bissot* v. *State*, 53 Ind. 408; *State* v. *Brown*, 7 Ore. 186.)

HAIGHT, J. Between four and five o'clock on the morning of March 20th, 1905, the defendant broke into the bake-shop of Paul Scheel, located in the basement of premises No. 901 Third avenue, between Fifty-fourth and Fifty-fifth streets in the city of New York. At the time, he had a horse and wagon, stationed in front of the premises, in the care of one Joseph Pesce. He had removed from the bake-shop a crate of eggs and placed it in the wagon, and had returned to the shop to get another crate, when he was discovered by a private watchman. The defendant, on discovery, ran out of the premises and told Pesce to run, and they both abandoned the property stolen as well as the horse and wagon, and ran northwardly along the east side of Third avenue to the corner of Fifty-fifth street, pursued by the watchman. The watchman had a night stick, and as he started to pursue the defendant he called for help, sounding his stick upon the walk, and then seeing Police Officer Enright upon the opposite corner of Fifty-fifth street, called to him to arrest the burglar. At the corner of Third avenue and Fifty-fifth street the defendant and Pesce separated, Pesce going westerly along Fifty-fifth street, while the defendant ran easterly. But by this time Police Officer Enright and a private citizen named Felix Stegman took up the pursuit of the defendant, the policeman calling upon him to stop or he would shoot. After running about three hundred feet upon Fifty-fifth street the policeman had so gained upon the defendant that he was but a few feet distant from him when the defendant suddenly drew his revolver and shot the policeman, producing a wound from which he died within a few hours.

In submitting the case to the jury the trial judge called the attention of the jurors to the definition of murder in the first degree, and after instructing them that in case they found that it was the deliberate and premeditated design of the defendant to kill Officer Enright in shooting him in the manner described that it constituted murder in the first degree; but that in case the defendant did not intend to kill Officer Enright, and that the killing was without premeditation or

deliberation, yet if the jurors find that he fired the shot at Enright which proved fatal after he had attempted to or had burglarized the premises of Scheel and was attempting to escape from the premises in the manner described by the witnesses, then their verdict ought to be for murder in the first degree. The defendant's counsel took an exception to the instruction of the court with reference to their right to convict if they found that the killing took place while he was engaged in the commission of a felony. This presents the only question which we are called upon to review.

Under the provisions of section 183 of the Penal Code it is murder in the first degree if the killing of a person is not excusable or justifiable when committed from a deliberate and premeditated design to effect the death of the person killed, or of another; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise. The evidence in the case amply warranted the trial court in submitting to the jury the question of the defendant's guilt under the first subdivision of the section referred to; for, it distinctly appears that before the defendant undertook the burglary upon Scheel's premises he provided himself with a loaded revolver and carried it upon his person. It was not an implement which would aid him in breaking into the premises, or in securing the property therein. The only use to which he could have well devoted it was to aid him in escaping in case he was discovered, and it is apparent that that was the use for which he designed it. I think, therefore, that the jury, under the circumstances of this case, would have been justified in finding the deliberate and premeditated design of the defendant to effect the death of any person who should attempt to prevent his escape from the premises in which the burglary was committed, and, in so far as the court charged upon this provision of the Code, no question is now raised as to its correctness. (*People* v. *Sullivan*, 173 N. Y. 122.) But, as we have seen, the trial court also submitted another provision of the Code to the jury, and

instructed them to determine whether or not the defendant was guilty under that provision. The defendant had committed a burglary, and if the death of Enright had been caused by him while engaged in the commission of that crime it would, undoubtedly, have been murder in the first degree; but, as we have seen, after he was discovered by the watchman he immediately ran from the premises, abandoning all of the property which he had stolen, and attempted to escape arrest. It is true that he was immediately pursued by the watchman and by Officer Enright, but we incline to the view that this did not operate to continue the burglary after the defendant had abandoned the property that he undertook to carry away and had escaped from the premises burglarized. In all of the cases to which our attention has been called, in which persons have been convicted of murder in the first degree by reason of the killing of a person while the accused was engaged in the commission of a burglary, the killing took place upon the premises.

In the case of *People* v. *Meyer* (162 N. Y. 357) the defendant had broken into a church and had taken away the money from the poor box. His presence in the church was made known through an electric appliance connected with the box, which gave notice to an adjoining building. He was immediately sought for by a policeman and others, and on discovering their search he retreated through the church, out of a door at the rear of the altar into an alleyway which led to a school building which was used in connection with the church. The policeman followed him into the school room and there was shot and killed, after which the defendant broke out one of the windows and jumped to the street. In that case it was held that the defendant was properly convicted of the killing while engaged in the commission of a burglary. But the act, as we have seen, was committed while he was still upon the property in one of the adjacent buildings and before he had broken out on to the street. He was, therefore, still engaged in the burglary.

In the case of *Dolan* v. *People* (64 N. Y. 485, 487) EARL,

J., in delivering the opinion of the court, says: "If a burglar break into a dwelling house burglariously, with the intent to steal, the offense is doubtless complete before he leaves the building, but he may be said to be engaged in the commission of the crime until he leaves the building with his plunder; and if, while there engaged in securing his plunder, or in any way or in any of the acts immediately connected with his crime, he kills any one resisting him, he is guilty of murder under the statute." We, consequently, conclude that at the time of the killing of Enright he had ceased to be engaged in the commission of a burglary.

The trial court, as we have seen, instructed the jury that if they found that Officer Enright was killed by the defendant while attempting to escape from the premises of Scheel in the manner described by the witnesses, that then their verdict might be for murder in the first degree. The defendant had committed a burglary. He had been discovered in the act. He was pursued by the watchman and by the policeman. He, therefore, knew that Officer Enright had the right to arrest him and when he found that he was about to be overtaken he drew his revolver and fired at the officer. By so doing he not only resisted arrest, but he committed another felony under section 218, subdivision 5, of the Penal Code, which provides that a person who assaults another to prevent or resist the execution of any lawful process or mandate of any court *or officer, or the lawful apprehension or detention of himself*, is an assault in the second degreee. Such an assault is made a felony and is punishable by imprisonment for not exceeding five years. The trial judge, in his charge, did not specifically call the attention of the jurors to this provision of the Code, or charge that the defendant might be convicted thereunder. Possibly he had it in mind, but we think he did not so express himself with reference thereto as to call upon the jurors to determine the question of the defendant's guilt or innocence thereunder. But, inasmuch as we have concluded to order a new trial, in which the question will doubtless be raised, we have concluded to

consider the force and effect of the provision as bearing upon the charge.

Assuming for the purpose of the argument that the defendant in firing the shot did not intend to kill, but only intended to frighten or so wound the officer as to prevent his effecting the defendant's arrest, still, we have the fact that the shot caused the death of the officer. The killing, therefore, was done by the defendant while he was actually engaged in the commission of a felony. But, notwithstanding this, a much mooted question arises in our minds as to whether the felony in which he was engaged at the time of the killing is merged in and became a part of the greater offense.

A person who attempts or engages in the commission of a felony, is not only chargeable with express malice, but also with being perversely wicked, evincing a depraved mind and a disregard of human life, and if, while so engaged, he causes the death of a person, although unintentional, the legislature has seen fit to enlarge the crime and make it murder in the first degree, so that, if a person engaged in the commission of a rape and in order to accomplish the act resorts to violence, from which death is unintentionally produced and which would be only manslaughter were it not for the malice, wickedness and intent to rape, yet by reason thereof it is made murder in the first degree. (*Buel* v. *People*, 78 N. Y. 492.) The same is true with reference to the unintentional killing of a person while engaged in the commission of a robbery, a burglary or an attempt to escape from imprisonment. There may be no intent to kill, but the violence having been perpetrated while engaged in the robbery, burglary or attempt to escape imprisonment, it is murder in the first degree. (*Cox* v. *People*, 80 N. Y. 500; *People* v. *Flanigan*, 174 N. Y. 356; *People* v. *Johnson*, 110 N. Y. 134.) On the other hand, it has been held, where the defendant seized a car hook and struck a person over the head on alighting from a street car, thus crushing his skull, which resulted in death, that the assault and battery was merged in the crime of murder and that the request to charge that the act was done in the com-

mission of a felony was properly refused. (*Foster* v. *People*, 50 N. Y. 598. See, also, *People* v. *Rector*, 19 Wend. 569, and *People* v. *Butler*, 3 Parker Cr. R. 377.) In order, therefore, to constitute murder in the first degree by the unintentional killing of another while engaged in the commission of a felony, we think that while the violence may constitute a part of the homicide, yet the other elements constituting the felony in which he is engaged must be so distinct from that of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder. (*Buel* v. *People*, 18 Hun, 487, 493; affirmed, 78 N. Y. *supra*.) Was the assault, therefore, in this case upon the officer a separate and independent felony from that of the homicide, or did it form a part of and become the chief ingredient of that crime? Under the provisions of the Penal Code, to which we have called attention, it is provided that a person who assaults an officer to prevent or resist the lawful apprehension of himself commits a felony. A person may prevent an arrest by hiding; he may resist in various ways without assaulting or using violence. It is apparent, therefore, that the *gist* of the offense is the assault and when it is by violence inflicting an injury to the person so assaulted, resulting in death, the act becomes a constituent part of the homicide and is merged in the charge therefor. It does not follow, however, that in the other felonies, in order to bring the case within the statute defining murder, the act which caused death must be a different one from that done in the commission of the collateral felony. By the same act one may commit two crimes, and to constitute murder in the first degree, as in the commission of a felony, it is not necessary that there should be an act collateral to or independent of that which causes the death; but if the act causing the death be committed with a collateral and independent felonious design it is sufficient; thus, if the violence used to commit a rape or a robbery results in death the case is plainly within the statute, and so this court has held in the cases above referred to. But as to the felony under consideration we think it was merged in the homicide.

The judgment and conviction should be reversed and a new trial granted.

CULLEN, Ch. J., WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur; O'BRIEN and VANN, JJ., concur, except as to the point last discussed in the opinion, as to which they express no opinion.

Judgment of conviction reversed, etc.

CORNELIA B. PAGE, Appellant, *v.* JAMES DEMPSEY, Respondent.

NEGLIGENCE — ACTION TO RECOVER FOR INJURIES CAUSED TO PROPERTY BY IMPROPER AND NEGLIGENT USE OF EXPLOSIVES IN BLASTING — PLEADING — PARTIES — ERRONEOUS NONSUIT. Where the complaint, in an action brought by the owner of an apartment house to recover for damages caused to her property by blasting upon the adjoining lot, alleges that the defendant was a contractor engaged in such work, and that by his improper manner of conducting the blasting and by the use of unnecessary and unreasonable quantities of explosives defendant caused much injury to plaintiff's house and property by the vibration or jarring of the earth or air resulting from such improper and unlawful blasting, the allegation that the defendant was the contractor is immaterial, and it is reversible error, therefore, to dismiss the complaint on the merits, upon the ground that the wrong person had been sued, as the contractor was the defendant's son, the defendant acting merely as a volunteer superintendent for the purpose of helping his son, where it is established, not only by the weight of evidence, but by what must be regarded as the uncontradicted evidence, that the defendant was in charge of the work, having the direction and control thereof. If the work of blasting was so negligently and improperly performed as to have caused the injury to plaintiff's house, all the persons engaged therein are to be regarded as joint tort feasors, and each is severally liable, so that the action is properly brought against the defendant, as in charge of the work of blasting, even if acting as a volunteer superintendent for the benefit of his son or otherwise.

Page v. *Dempsey*, 99 App. Div. 152, reversed.

(Argued February 6, 1906; decided March 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered Jan-

uary 19, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

William F. Clare for appellant. The defendant is liable for aiding, abetting and assisting in the creation of a nuisance and in its maintenance for nearly a month. (*Campbell* v. *U. S. F. Co.*, 73 Hun, 576; *Simmons* v. *Everson*, 124 N. Y. 319; *Morris* v. *Barrisford*, 9 Misc. Rep. 14; *Campbell* v. *Seaman*, 63 N. Y. 568; *Stevens* v. *Pucci*, 32 Misc. Rep. 464; *Booth* v. *Rome Co.*, 140 N. Y. 267; *Hill* v. *Schneider*, 13 App. Div. 299; *Morgan* v. *Bowers*, 42 N. Y. S. R. 791; *Rafter* v. *Tagliabue*, 29 Abb. [N. C.] 1; *Newell* v. *Woolfolk*, 91 Hun, 211.)

T. M. Tyng and *Edward D. Dowling* for respondent. The finding of fact that the blasting operations were not conducted by the defendant, nor was the alleged injury caused by his servants or agents, or by any one for whose negligence the defendant is responsible, is sustained by the proof. It, therefore, cannot be disturbed. (*Leary* v. *Corvin*, 181 N. Y. 222.)

EDWARD T. BARTLETT, J. The plaintiff is the owner of the house and lot No. 330 West Fifty-first street, in the borough of Manhattan, city of New York. The lot is about thirty feet in width and one hundred feet deep, upon which is a five-story brick and stone apartment house, containing space for ten families. In July, 1902, the lot immediately east of these premises was vacant, and workmen were engaged thereon in blasting rock in order to excavate for a cellar.

The complaint alleges that the defendant was a contractor engaged in the work, and that on several days in the month of July, 1902, on the 12th, 15th, 17th, 18th and 19th, the defendant caused much damage by such blasting, shaking and

cracking the walls and partitions, loosening and destroying the mason work, plastering, papering and painting, and injuring the woodwork and plumbing.

The complaint further alleges that the defendant, by the improper manner of conducting the blasting and the use of unnecessary quantities of explosives and conducting the work in an improper manner, had not only committed this injury to the property, but had terrified the tenants, some refusing to pay rent and others threatening to vacate the premises. The plaintiff prayed for and obtained an injunction *pendente lite*, and the work of blasting in this improper manner was discontinued. Damages were demanded in the sum of five thousand dollars. The defense was practically a denial. The trial judge dismissed the complaint on the merits at the close of the case, on the ground that the wrong Dempsey had been sued, as the contractor was defendant's son.

There are two findings of fact, as follows: (1) That the plaintiff was the owner and in possession of the premises and the building thereon, known as No. 330 West Fifty-first street, borough of Manhattan, New York city; and that in or about the month of July, 1902, blasting was being done on certain vacant premises immediately adjoining the said premises of the plaintiff on the east. (2) That said blasting operations were not conducted by the defendant, nor was the alleged injury to the plaintiff's said premises, or the alleged damage sustained by the plaintiff by reason thereof, caused by his servants or agents, or by any one for whose negligence in the prosecution or management of said blasting operations the defendant is responsible.

The affirmance of this judgment by the Appellate Division was with a divided court and the question considered is a very narrow one. The learned court says in the prevailing opinion: "The single question presented for our determination is whether the defendant was liable for the damages caused to plaintiff's building by the negligent blasting. Upon one of two theories he would be liable; either that he was the contractor engaged in blasting, or else as superintendent or

assistant, he directly participated in the negligent use of the explosives which injured the plaintiff's building. Upon the latter theory, the defendant, whoever may have been the responsible contractor, would be liable as a joint tort feasor. The difficulty, however, in holding the defendant liable upon this theory is the lack of evidence to support it."

The dissenting opinion, in which two of the learned justices united, in regard to the question involved, reads in part as follows: "The allegation in the complaint that the defendant was the contractor is immaterial. The material part of it is that the plaintiff's property had been injured by the unlawful acts of the defendant. If this was true then the plaintiff was entitled to recover, irrespective of the capacity in which he acted."

It may be conceded that if it was necessary for the plaintiff to prove that the defendant had entered into a contract for the removal of rock by blasting upon the lot in question, she has not sustained that allegation by uncontradicted evidence, and that the documentary proof introduced on behalf of the defendant, showing that the defendant's son had entered into a contract in writing for the prosecution of this work, would render it impossible for this court to hold that there was no evidence justifying the finding "that said blasting operations were not conducted by the defendant." We, however, agree with the dissenting opinion of the Appellate Division that the allegation in the complaint that the defendant was the contractor is immaterial.

If it be conceded that the only proof necessary for the plaintiff to make was that the defendant, James Dempsey, was in charge of this work, not as contractor, but as having direction and control thereof, it was established not only by the weight of evidence, but by what must be regarded as the uncontradicted evidence. It was proved by a number of witnesses, residents of the premises injured, that the defendant was frequently present and apparently directing the workmen as one in control of the work. Some of these witnesses observed this from adjacent windows and other places not

within hearing distance, where they were unable to give defendant's words as addressed to the workmen, but testified to his gestures and other actions, indicating one supervising the men at work. Defendant was also seen to have been engaged with other workmen in arranging the blasting and charging holes with dynamite. A witness swore that the defendant was on the premises every day in July, 1902.

The defendant, when sworn by plaintiff as a witness, admitted that the boiler, drills and tools used on the work were his property, and kept in a tool house or chest on the premises, upon which appeared his name. He also admitted that he collected and receipted in his own name as contractor for the proceeds of the work, and deposited the proceeds in his own bank account, and drew out therefrom the amount of the men's wages and paid them; that he never had accounted for the money to his son, who was twenty-four years of age, unmarried, and lived at home with him.

It further appears that no witness testified to having seen the son on the work at any time. It was also proved that the son was duly subpœnaed as a witness on the trial and failed to appear. The janitor of plaintiff's building swore that he saw the defendant on the work almost every day. "I saw him charge the holes with dynamite." Another witness swears: "At different times I heard Mr. James Dempsey speak to the men about hurrying up the work and things like that."

It was further proved that Rosenberg and Feinberg were the owners of the premises on which the blasting was being conducted, and in the month of May or June they made a contract with one Thomas Burns for excavating and blasting. Thomas Burns testified that when the defendant James Dempsey and his son William J. Dempsey called on him after he made this contract, the defendant said, in substance, that he desired to do the work, and he had long experience in the blasting business; that when it came to making out the contract it was in the name of William J. Dempsey, the son.

It was further proved that on the 18th of July, 1902,

Thomas Burns gave the defendant James Dempsey this order on the owners of the premises, reading as follows: "Messrs. Rosenberg and Feinberg: Gentlemen.—Please pay bearer, James Dempsey, $550 (five hundred and fifty) as per my contract *with him* for excavation of rock on your cellars south side of 51st street, between 8th and 9th avenues, and charge the same to my contract for above excavating. Very truly yours, Thomas Burns." The defendant collected this money and receipted for the same.

If the evidence already referred to was all that was introduced by the plaintiff it might possibly be argued that we would not be justified in holding that she had proved by uncontradicted evidence that the defendant was in charge of this work. The fact is that the defendant, when placed on the stand by the plaintiff, has furnished the additional proof if it was necessary. We have already pointed out that some of his admissions on the stand were most persuasive evidence that he was in charge of the work, but there is more of it. On the direct examination he testified that he was occasionally on the work, and that he went there, to use his own language, "for the benefit of my son, to help him along the best I could. I did not want any benefit from him; if I could help him I wanted to do it." On cross-examination we have this question and answer: "Q. As a matter of fact in regard to this present contract, did you have anything whatever to do with its procurement or with its execution other than what you testified you did, to help your son along *in looking after the work that was being done upon it*, and furnishing him machinery for working upon it? A. Nothing whatever."

In this question the witness was asked if he had anything whatever to do with the execution of the contract other than he had testified, and he swears that he had not. This question assumed all that he had testified to, and his answer necessarily confirms on cross-examination the truth of his former statements. In other words, he admits under cross-examination that he was on the work for the benefit of his son, to

help him along the best that he could, which, taken in connection with his ownership of the plant, the collection of the money for the performance of the work, depositing it in his own bank account, drawing it out to pay the men, and never accounting for any of the transactions growing out of this undertaking to do the blasting on the premises in question, establishes by his own evidence, in direct contradiction of the second finding of fact, that "said blasting operations were not conducted by the defendant," that they were.

Assuming that the defendant was a volunteer superintendent in charge of the men employed and directed the manner of conducting the work, they may be all treated as joint tort feasors, if it appears that the work was so negligently and improperly performed as to have caused the injury to plaintiff's house.

It is not claimed, so far as the record discloses, that there was physical invasion of the plaintiff's premises by the projection of rock or other substances upon them, but that the injury was caused by the vibration or jarring of the earth or air causing serious damage to the house and personal property contained therein.

The law applicable to this situation has been settled by the decisions of this court. If the premises of the plaintiff were invaded by projectiles of any kind, it would be a trespass, for which damages could be recovered, although there was no proof of negligence or want of skill. (*Hay* v. *Cohoes Co.*, 2 N. Y. 159; *Tremain* v. *Cohoes Co.*, 2 N. Y. 163; *St. Peter* v. *Denison*, 58 N. Y. 416.)

Where the injury involves no trespass upon the plaintiff's premises, but is due solely to concussion, causing great disturbance, jarring and vibration of the earth or air, the plaintiff to maintain an action to recover damages must prove that the work was performed in a negligent and improper manner. The law governing this phase of the case was considered in *Booth* v. *R., W. & O. T. R. R. Co.* (140 N. Y. 267) in an able and elaborate opinion of ANDREWS, Ch. J. In that case the court charged the jury, in substance, that the

defendant in using powerful explosives in blasting, did so at its peril and was liable if plaintiff's house was injured thereby; that "it made no difference whether the work was done carefully or negligently." This charge was held erroneous. ANDREWS, Ch. J., said in this connection (p. 280): "But the defendant here was engaged in a lawful act. It was done on its own land to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that the other buildings nearby were not injured. The immediate act was confined to its own land, but the blasts, or setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. * * * The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think the plaintiff has no legal ground of complaint." The converse of this proposition is true, and if the plaintiff had proved that the work was not carefully done, and the injury was due to negligence and carelessness, a recovery would have followed.

The learned judge in discussing the burden of proof in the above case said (p. 273): "But mere proof that the house was damaged by the blasting would not alone sustain the action. It must further appear that the defendant in using explosives violated a duty owing by him to the plaintiff in respect of her property, or failed to exercise due care. Wrong and damage must concur to create a cause of action."

In the case at bar there was evidence which would have justified the court in finding that the blasting was negligently conducted, by reason of defendant's failure to take the usual precautions to prevent injury to adjoining buildings and by use of excessive quantities of explosives, but the court made no finding on this question. (*Miller* v. *N. Y. & N. S. Ry. Co.*, 183 N. Y. 123–128.)

As all the persons engaged in the work of blasting are to be regarded as joint tort feasors, each is severally liable, and this action is properly brought against the defendant as in

charge of the work of blasting, even if acting as a volunteer superintendent for the benefit of his son or otherwise.

It follows that the judgment and order appealed from should be reversed and a new trial ordered, with costs to abide the event.

CULLEN, Ch. J., GRAY, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment and order reversed, etc.

WALTER McDOUGAL, Appellant, *v.* JOHN MALAGHAN, Respondent, Impleaded with Another.

LIQUOR TAX LAW — WHEN REAR DOOR OF A CITY DWELLING IS NOT AN "ENTRANCE" WITHIN MEANING OF SECTION 17, SUBD. 8. A rear door of a city dwelling, leading to the back yard thereof and inaccessible to anybody desiring to pass from the street, or other point outside of the dwelling into the latter, is not an "entrance" within the meaning of the statute (Liquor Tax Law [L. 1896, ch. 112], § 17, subd. 8) requiring the consent of at least two-thirds of the owners of dwelling houses within 200 feet of a proposed saloon, such distance to be "measured in a straight line of the nearest entrance to a building or buildings occupied exclusively for a dwelling."

McDougal v. *Malaghan*, 108 App. Div. 355, affirmed.

(Submitted February 28, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 23, 1905, which affirmed an order of Special Term denying an application for the revocation of a liquor tax license.

The facts, so far as material, are stated in the opinion.

Alfred H. Holbrook for appellant. Any entrance to a building occupied exclusively as a dwelling, if within 200 feet of the saloon entrance, must be included in the application whether it is a back, side or front entrance, or whether it leads to the street or yard or whether it is separated from the

saloon by a fence or wall. (L. 1896, ch. 112, § 17.) This construction is not only the ordinary interpretation of the language used, but it effectuates the general purpose and intent of the Liquor Tax Law. (*People ex rel. Einsfeld* v. *Murray*, 149 N. Y. 378.) This saloon in the rear of these dwellings is as obnoxious to the inhabitants and as detrimental to the value of the dwellings as if it were in front. (*Matter of Veeder*, 31 Misc. Rep. 569, 570; *Matter of Saunderson*, 34 Misc. Rep. 375.) The measurement of 200 feet is to be taken on a straight line disregarding all obstructions. (*Matter of Bridge*, 36 App. Div. 533; *Matter of Ruland*, 21 Misc. Rep. 504.)

William E. Schenck and *Herbert H. Kellogg* for state commissioner of excise. The purpose of the legislature was to provide against proximity of the saloon to the church, schoolhouse and dwelling, instead of accessibility from one to the other, and, therefore, the back doors of the houses in question were entrances within the meaning of the statute. (*Matter of Holden* v. *McCusker*, 23 Misc. Rep. 446; *Matter of Lewis* v. *Pilchen*, 26 Misc. Rep. 532; *Matter of Ruland*, 21 Misc. Rep. 504; *Matter of McMonagle* v. *Wainwright*, 41 Misc. Rep. 408; *Matter of Bridge* v. *Mohrman*, 36 App. Div. 533; *People ex rel. Macy* v. *Murray*, 5 App. Div. 66; *Matter of Macy*, 5 App. Div. 70; *People ex rel. Gentilesco* v. *Excise Board*, 7 Misc. Rep. 415; *People ex rel. Cairns* v. *Murray*, 148 N. Y. 171; 13 Misc. Rep. 522; *People ex rel. Clausen* v. *Murray*, 16 Misc. Rep. 398.)

Hugo Hirsh for respondent. The rear exits from the dwellings into the yards are not entrances within the contemplation of the Liquor Tax Law (L. 1896, ch. 112, § 17).

Per Curiam. This proceeding was commenced by a taxpayer of the borough of Brooklyn to revoke a liquor tax certificate issued to John Malaghan on the first of July, 1905, upon the ground that it was illegal because he did not file

with his application the consents of the requisite number of owners of dwelling houses within 200 feet of his saloon.

The statute provides that "when the nearest entrance to the premises described in said statement as those in which traffic in liquor is to be carried on is within two hundred feet, measured in a straight line, of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be so filed simultaneously with said statement a consent in writing that such traffic in liquors be so carried on in said premises during a term therein stated, executed by the owner or owners, or by the duly authorized agent or agents of such owner or owners of at least two-thirds of the total number of such buildings within two hundred feet so occupied as dwellings," etc. (Liquor Tax Law, § 17, subd. 8.)

The saloon in question is located on the southwesterly corner of a block bounded on the north by a street the name of which is not given; on the east by Prospect place; on the south by Franklin avenue, and on the west by Park place. Certain buildings in said block fronting on Park place, known as Nos. 629, 631, 633 and 635, are respectively occupied exclusively as dwellings. The rear door of each of these buildings is less than 200 feet, measured in a straight line, from the nearest entrance to said saloon, while the front entrance of each thereof is not within 200 feet thereof. In the statement of facts agreed upon for the purpose of the trial it was stipulated that "the so called rear entrances of the buildings on Park Place" above named "are doors leading from the first floor of said buildings to the back yards of said houses and are open and used by the inhabitants of said dwellings." The yards in question are entirely surrounded by a fence and there is no access to the street therefrom, but there is no fence separating the yards from each other.

The sole question presented for decision is whether the rear door leading to the back yard of each of said dwellings is an entrance within the meaning of the statute requiring the consent of at least two-thirds of the owners of dwelling houses within 200 feet of the proposed saloon.

We do not think that it is such an entrance. In support of the contention that it is such an entrance it is urged that the legislature had in view the proximity of the proposed saloon to the dwellings and that because children, for instance, might pass through one of these rear doorways into the yard and thus come within two hundred feet of the saloon and of any influences and sights incidental thereto we should hold that such doorway is an entrance within the meaning of the statute. Whatever view the legislature had of restricting the existence of saloons within a certain distance of a dwelling house it adopted, as the test of proximity, the entrance. It did not forbid the establishment of a saloon because it might be within a certain prescribed distance of the yard or windows from which children or other people might watch its operation. The test established was the distance from an entrance.

Accepting such test, we do not think that one of the doorways in question fairly comes within the spirit of the statute as being an entrance to the dwelling house. We think that the statute contemplated a doorway or passageway which might be used by any person outside the dwelling desiring to enter the same. It is, of course, not necessary that this entrance should be upon the front of the dwelling. It may be upon the side or the rear, but still it should be a means of ingress accessible to anybody desiring to pass from the street or other point outside of the dwelling into the latter. We do not think that the statute by this general term of entrance contemplated a passageway which could only be used as a means of ingress by some person who already having entered the house in some other way, then passed out of it through the passageway in question, and then for the first time by turning around was able to enter the dwelling house thereby and make it a means of entrance. This was the character of the doorway under review. It could not be used by anybody approaching from the street or by anybody from even an adjoining dwelling house, except by passing over the rear of lots, where it does not appear any passageway was provided. It was evidently intended for the convenience of the inmates

of the house who might desire first to go out of the house into the yard and then to return.

We think the order appealed from should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Order affirmed.

DELIA C. ROBERTS, Appellant, *v.* ROBERTS-WICKS COMPANY, Respondent.

1. BUSINESS CORPORATIONS — CONSTRUCTION OF PROVISIONS IN CHARTER AND CERTIFICATES RELATING TO DIVIDENDS ON PREFERRED STOCK. Where the charter of a business corporation and the certificates issued to holders of preferred stock provide that such stock shall be entitled to dividends, at a specified rate, out of the surplus profits arising from the business, before any dividend be paid on the common stock, and that such dividends shall be cumulative and in case of non-payment shall bear interest at a fixed rate from the date when payable, such provision constitutes a valid contract between the company and the preferred stockholders, which is binding upon all other stockholders.

2. REDUCTION OF CAPITAL STOCK WHILE COMPANY IS IN DEFAULT OF DIVIDENDS ON PREFERRED STOCK — RIGHTS OF PREFERRED STOCKHOLDERS. The fact that such corporation, having failed to pay any dividends on its preferred stock for three years, reduced its capital stock under the statute (Stock Corporation Law [L. 1890, ch. 564], § 44, as amd. by L. 1892, ch. 688), giving to its stockholders their proportionate number of shares in exchange for their former holdings, does not affect the rights of the preferred stockholders as to previous arrears of dividends; as a result of such reduction, the preferred stockholders have a less number of shares, but, as between themselves and the other stockholders, they are still creditors for the arrears of dividends due from the company on the shares of preferred stock which they had previously held, and are entitled to be paid such arrears, with the stipulated interest thereon, before any of the surplus profits can be appropriated to a dividend upon the common stock.

3. RESOLUTION OF BOARD OF DIRECTORS DIRECTING PAYMENT OF ARREARS OF DIVIDENDS ON REDUCED PREFERRED STOCK AND ALSO ON COMMON STOCK. A subsequent resolution of the board of directors, adopted after such corporation had accumulated a surplus of profits,

directing the payment of the amount due to the preferred stockholders in full of dividends upon their reduced stock, with interest thereon from the time the last dividend had been paid and also declaring a dividend on the common stock, is invalid and cannot be sustained; it was the duty of the directors in dividing the surplus profits to apply them, in first order, to the satisfaction of the debt to the preferred stockholders for the arrears of dividends on the whole number of their shares outstanding during the three years prior to the reduction of the capital stock, with the stipulated interest accrued thereon.

4. REDUCTION OF CAPITAL STOCK — SURPLUS CREATED THEREBY CANNOT BE APPLIED UPON ARREARS OF DIVIDENDS DUE TO PREFERRED STOCKHOLDERS. The preferred stockholders have, however, no right to any surplus created by the reduction of capital stock; such surplus cannot be regarded as "surplus profits arising from the business of the corporation," since it is not within the intendment of the agreement with respect to dividends on the preferred stock, and its distribution, when made, can only be legally effected by dividing it among all the stockholders ratably and without preference, so that it is not applicable to the claim of the preferred stockholders for the arrears of unpaid dividends.

Roberts v. *Roberts-Wicks Co.*, 102 App. Div. 118, reversed.

(Argued February 12, 1906; decided March 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 1, 1905, upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

It appears that the defendant was duly incorporated under the Business Corporations Law, for the manufacture and sale of clothing, in 1895, with a capital stock of $200,000, divided into 2,000 shares; 500 shares ($50,000) being preferred stock, and 1,500 shares ($150,000) being common stock; each share being of the par value of $100.

The certificate of incorporation provided that "out of the surplus profits arising from the business of the corporation the holders and owners of the preferred stock shall be first entitled to, and be paid each year, a dividend equal to six per cent, * * * payable in equal semi-annual payments, before any dividends shall be paid on the common stock; such dividend shall be cumulative, and, in case of non-payment, shall bear interest at the rate of six per cent from the date

when payable. All the remaining surplus profits of such corporation shall belong to the common stock, and be divided among the holders and owners thereof, as the board of directors shall direct. In all other respects the preferred and common stock shall be alike."

On the 16th day of April, 1898, the capital stock of the corporation was duly increased to $300,000, divided into $75,000 of preferred stock and $225,000 of common stock; represented by 3,000 shares of the par value of $100, each. There was no change made in the form of the certificate of incorporation in the preference of the preferred stock. All of the stock was duly issued and paid for in cash at par.

Prior to July 1st, 1901, the plaintiff became the owner of 250 shares, or $25,000, of the preferred stock of the defendant and held a certificate therefor. The certificate provided, as before, that the owners of the preferred stock of the company were entitled to an annual dividend of six per cent, payable in equal semi-annual payments out of the surplus profits of the company, before any dividend was payable on the common stock; that such dividend on the preferred stock was cumulative and, in case of non-payment, should bear interest at the rate of six per cent from the date when payable; that all the remaining surplus profits of the company should belong to the common stock and that in all other respects the preferred and common stock were alike.

From July, 1901, to June 25, 1904, the defendant had made no surplus profits from its business and its capital of $300,000 had become impaired to the extent of $90,861.85. On the latter date, the defendant duly reduced its capital stock from $300,000 to $200,000, divided into $50,000 of preferred stock and $150,000 of common stock, and the corporate capital was as it had been prior to the increase of April, 1898. This reduction left a surplus of $9,138.15 over the capital stock of $200,000.

The plaintiff voted against the reduction of the capital stock of the defendant; but after the said reduction, and in October, 1904, she surrendered her certificate for 250 shares,

($25,000), of preferred stock and received a new certificate, in the same form, for 166 shares and scrip for fractional parts of a share. Through purchase of additional scrip and the exchange thereof she now holds certificates for 167 shares, ($16,700), of the preferred stock. Semi-annual dividends, at the rate of six per cent per annum, were paid upon the preferred stock up to July 1st, 1901. Since that time none had been paid upon such stock until December, 1904. Between June, 1904, when the capital stock was reduced, and December 1st, 1904, the defendant gained surplus profits, to the amount of $15,087.40.

On December 20th, 1904, the board of directors adopted a resolution directing "the amount due to the preferred stockholders in full of dividends and accrued interest thereon to December 1st, 1904, upon the $50,000 preferred stock of the company, be paid January 2d, 1905, to the preferred stockholders of record December 26th, 1904." The board, further, declared a dividend of one per cent upon the $150,000 of common stock, payable on May 1st, 1905.

The dividends declared on the preferred stock included all the dividends, to which the plaintiff was entitled upon her then holding of $16,700 of preferred stock, and the interest accrued thereon from the time the last dividend had been paid up to December 1st, 1904. The plaintiff claims that she was entitled to be paid the dividends payable on $25,000 of preferred stock up to June 25th, 1904, the date of the reduction of the capital stock, cumulatively; so that interest should be added to each unpaid dividend from the date when payable upon such amount of preferred stock. The Appellate Division, in the fourth department, awarded judgment to the defendant and the plaintiff has appealed to this court.

H. J. Cookinham for appellant. The $9,138.15 item in the statement of June 25, 1904, is surplus earnings. (*Williams* v. *W. U. Tel. Co.*, 93 N. Y. 162; *People ex rel. S. Mfg. Co.* v. *Wemple*, 78 Hun, 63; *People ex rel. A. A. & T. Co.* v. *Roberts*, 82 Hun, 313; *Christensen* v. *Eno*, 106 N. Y.

97; *M., etc., Bank* v. *Townsend*, 5 Blatchf. [U. S.] 315; *Farrington* v. *Tennessee*, 95 U. S. 679; *Strong* v. *B. C. R. R. Co.*, 93 N. Y. 426.) Plaintiff is entitled to receive, on the $25,000 preferred capital stock held by her up to June 25, 1904, semi-annual dividends, at the rate of six per cent per annum, with interest thereon from the date when the same should have been paid up to the time of payment, before any dividend can be paid on the common stock. (*Ernst* v. *E. M. I. Co.*, 24 Misc. Rep. 583; *Kent* v. *Q. S. M. Co.*, 78 N. Y. 159; *Einstein* v. *R. G. & E. Co.*, 146 N. Y. 46; *Sutherland* v. *Olcott*, 95 N. Y. 100; *Campbell* v. *A. Z. Co.*, 122 N. Y. 455; *Stoddard* v. *Lum*, 159 N. Y. 265; *Howarth* v. *Angle*, 162 N. Y. 179; *Richmond* v. *Irons*, 121 U. S. 27; *Wood* v. *Lary*, 47 Hun, 550; *Prouty* v. *M. S. & N. I. R. R. Co.*, 1 Hun, 655.)

William Kernan for respondent. The surplus of $9,138.15 produced by the reduction of the capital stock of the corporation was a surplus of capital; it was not surplus profits or surplus earnings, out of which dividends upon the preferred stock could be paid as claimed by the plaintiff. (L. 1890, ch. 567; L. 1892, ch. 688, §§ 23–46; Penal Code, § 594; Taylor on Corp. § 565; Cook on Corp. [5th ed.] §§ 271, 546; *Seeley* v. *N. Y. E. Bank*, 8 Daly, 400; 78 N. Y. 608; *Strong* v. *B. C. T. R. R. Co.*, 93 N. Y. 426; *Merz* v. *I. C. Co.*, 87 Hun, 440; *Williams* v. *W. U. T. Co.*, 93 N. Y. 162; *People* v. *L. Ins. Co.*, 92 N. Y. 458; *St. John* v. *E. R. R. Co.*, 10 Blatchf. [U. S.] 271; 22 Wall. 136; *N. Y., L. E. & W. R. R. Co.* v. *Nickalls*, 119 U. S. 296, 308; *M. R. R. Co.* v. *Tennessee*, 153 U. S. 486.) Plaintiff is not entitled to dividends on the whole of the $25,000 of her preferred capital stock from July 1, 1901, the date to which dividends were paid, to June 25, 1904, when her said stock was reduced to $16,700. She is entitled to such dividends on the said $16,700 of stock now held by her, and which dividends were declared to her by the defendant December 20, 1904; but she is not entitled to any dividend on the $8,300 of said stock

canceled by reduction of the capital stock of the defendant. (*Seeley* v. *N. Y. E. Bank*, 8 Daly, 400; *Strong* v. *B. C. T. R. R. Co.*, 93 N. Y. 426; *Merz* v. *I. C. Co.*, 87 Hun, 440; *Williams* v. *W. U. Tel. Co.*, 93 N. Y. 162; *People* v. *L. Ins. Co.*, 92 N. Y. 458.)

GRAY, J. From the foregoing facts, which the parties have stipulated as resuming the whole situation, it is apparent that our consideration of this appeal is, in no degree, embarrassed by any question of the power of the directors to increase the capitalization of this company in 1898, or to reduce it in 1904. In each case, we may assume, it was duly and legally effected and the only question is whether when, subsequently to the reduction of the capital stock in June, 1904, a distribution of the surplus profits was declared, the plaintiff, as a preferred stockholder, was entitled to be paid for arrears of dividends, payable during the years prior to the reduction, upon the 167 shares of preferred stock, of which she was then the actual holder, or upon the 250 shares of which she had previously been the holder.

When, in 1898, the capital stock was increased to 3,000 shares, or $300,000, the plaintiff became the holder of 250 shares of preferred stock and she received the six per cent dividends thereon down to July 1st, 1901. From that time down to June, 1904, the company made no surplus profits from its business; the capital had become impaired to the extent of upwards of $90,000 and no dividends had been declared to its stockholders. A reduction of the capital stock being then resolved upon, it was accomplished, so as to establish it at its former amount of 2,000 shares, or $200,000. Thereafter, the business prospered; so that, in the following six months, the earnings had so increased as to show a surplus of profits accumulated in the corporate treasury and the directors resolved to distribute them by way of a dividend. By their resolution, a payment was to be made of "the amount due to the preferred stockholders in full of dividends and accrued interest thereon to December 1, 1904, upon the

$50,000 preferred stock of this company," etc., and a further dividend of one per cent was declared upon the common stock. The payment to the preferred stockholders, however, as to arrears of dividends being made upon the number of shares as reduced, the complaint of this appellant, in effect, is that the defendant has measured its obligation to its preferred stockholders, with respect to the past, by the amount of their present holdings; whereas its obligation upon that much of the preferred stock, which had been theirs prior to the reduction of the capital stock, had never been fulfilled, nor released.

In the charter and in the certificates issued to the preferred stockholders, it was stated, most explicitly, what was the nature of the preference, which was accorded to that class of stockholders; namely, to be paid "out of the surplus profits arising from the business of the corporation * * * a dividend equal to six per cent per annum on the preferred stock, payable in equal semi-annual payments, before any dividend shall be paid on the common stock; such dividend on the preferred stock shall be cumulative and in case of non-payment shall bear interest at the rate of six per cent per annum from the date when payable." This was a valid contract between the company and the preferred stockholders, which was binding upon all other stockholders. (*Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159, 180.) Each class of stock was a part of the whole capital stock and both classes were made by the charter alike, in all respects, except in the one respect that the preferred stock was entitled to have "the surplus profits arising from the business" appropriated, in first order, to the payment of six per cent dividends, cumulatively. Now this was as much an agreement of the common stockholders, as it was the agreement of the corporation and the right of the preferred stockholder was inviolable. It assured to him, in effect, that if the corporate earnings failed to show surplus profits sufficient to pay a dividend due on the preferred stock, to the extent of the default in payment and of the accruing interest thereon, there would be a specific

charge upon all subsequent surplus profits gained by the company. In other words, the dividends agreed to be paid upon such shares of stock were a charge upon the profits of the company for all time and all arrears of such dividends, with accrued interest, were to be paid out of any moneys applicable to such payment before any payment should be made to the common stockholders. (*Boardman* v. *L. S. & M. S. R. Co.*, 84 N. Y. 157; *Sturge* v. *E. N. R. R. Co.*, 31 Eng. L. & Eq. 406; *Henry* v. *G. N. R. Co.*, 3 Jurist [N. S.], part 1, 1117.) This right, necessarily, survived the reduction of the capital stock, as to previous arrears of dividends; unless the obligation of the company had, in some way, been discharged. Concededly, it survived as to the preferred stock in its reduced amount and what was there in the action of reducing the capital stock, which was operative to cancel it as to the arrears of unpaid dividends upon the shares of stock which were retired, or cut off, by the reduction? The Stock Corporation Law, (Chap. 688, § 44), authorized the reduction to be made; but that statute and the proceedings under it could not affect any vested right, nor impair the force of any corporate obligation. Nor was it intended to accomplish any such thing; or any thing more than to authorize the holders of a majority of the stock, when the circumstances seemed to them to justify it, to increase, or to reduce, the amount of the capital stock. Its reduction left the affairs and obligations of the corporation just as they had been, with the sole difference of the lessened capitalization of the concern. There would still remain the obligation of the corporation upon any unperformed agreement; for no obligation was satisfied thereby. Its agreement to pay dividends on the preferred stock had not been fulfilled and, so long as the corporation was a going concern, this default created an indebtedness, which was payable whenever, in the future, it should accumulate surplus profits from the conduct of the business.

The preferred stockholders, as the result of the reduction of capital stock, would hold a less number of shares; but they would still be creditors for the arrears of dividends due by

the company on the shares of preferred stock, which they had previously held. They may not have been creditors of the corporation, in a technical sense; but, as between themselves and other stockholders, they were as creditors, with demands to be fully paid certain arrears of dividends before any of the surplus profits should be appropriated to a dividend upon the common stock. The common stockholders held their shares of stock subject to that prior charge upon the net earnings. No acts of theirs could destroy that right and it, of course, in no wise, depended upon any declaration of the board of directors. Directors have a wide discretion in the management of the corporate affairs and their declaration of a dividend from surplus assets, when honestly exercised, will not be interfered with by the courts; but that does not mean that they have the power to discriminate in the division of the surplus to the impairment of any prior right thereto.

When the defendant's directors met, in December, 1904, to act upon the question of dividends, their duty was, in dividing the surplus profits, to apply them, in first order, to the satisfaction of the debt to the preferred stockholders for arrears of dividends on the whole number of their shares, which were outstanding during the three years prior to July, 1904, before the capital stock was reduced. For the purpose of such a dividend, however, only such surplus as represented the profits of the business could, legally, be availed of, and this brings us to consider the question of the disposition of the surplus of capital, left upon the reduction of the capital stock, which the appellant claims to be equivalent to surplus profits and, hence, to be applicable upon the company's debt to the preferred stockholders for arrears of dividends. As it has been stated, the capital of the defendant had become impaired, by June, 1904, to the extent of $90,861.85, and this necessitated the reduction as then effected. The reduction to $200,000, thus, left the sum of $9,138.15, which was an excess, or surplus, of capital. Whether it consisted in funds, or in property, we are not informed and it is not material to our consideration. We may assume that the directors could

have converted it into cash and have distributed it by way of dividends; but the preferential right of the preferred stockholders did not reach to a distribution of that which was capital, nor create any charge upon capital. That which constitutes the capital stock of a corporation belongs to all of its stockholders, proportionately to their holdings. It is divided into shares and each share represents the holder's proportionate interest. (*Jermain* v. *L. S. & M. S. R. Co.*, 91 N. Y. 492.) Upon dissolution, or in liquidation, it entitles him to share ratably in the assets. If the directors had undertaken to divide this surplus of capital, it was apportionable, only, among all the stockholders ratably. The statute contemplated nothing else than that. Indeed, it is inferable, perhaps, that the only authorization to dispose of such corporate property is to return it to the stockholders. The statute reads, (Stock Corporation Law, § 46), "If the capital stock is reduced, the amount of capital over and above the amount of the reduced capital shall, if the meeting or consents so determine or provide, be returned to the stockholders pro rata, at such times and in such manner as the directors shall determine." But, assuming that the directors in their discretionary management of the company's affairs, concluded, and were empowered, to distribute this surplus of capital, the preferred stockholders would have no legal, or equitable, claim upon it in satisfaction of past due and unpaid dividends. That was not the contract. Their only right would be to share in such a distribution ratably with the common stockholders. (*Strong* v. *Brooklyn C. T. R. R. Co.*, 93 N. Y. at p. 435.) The charter and the contract made them alike in all respects except as to dividends. Dividends, as the rule, are not payable out of the capital of a corporation; but only from the surplus profits arising from the business carried on and that was the contract here. When the property of a corporation has *accumulated* in excess of its chartered capital, the excess may be regarded and dealt with as constituting a surplus of profits. For a fuller discussion of such questions, I may refer to the cases of *Kent* v. *Quicksilver Mining Co.*, (78 N. Y.

159, 179); *Williams* v. *Western Union Telegraph Co.*, (93 ib. 162, 188, 191, 192); *Strong* v. *Brooklyn C. T. R. R. Co.*, (93 ib. 426, 433, 435) and *Beveridge* v. *N. Y. E. R. R. Co.*, (112 ib. 1). In the present case, it must be borne in mind that the $9,138.15 remained in the corporate accounts, after the reduction of capital stock, as a portion of the former capital and it was, in no sense, like an excess of property, which had been accumulated in the conduct of the business beyond the fixed capital. It did not represent "surplus profits arising from the business;" it was not within the intendment of the agreement with respect to dividends on the preferred stock and its distribution, when made, could only be legally effected by dividing it among all the stockholders ratably and without preference. (See *Seeley* v. *N. Y. Exchange Bank*, 8 Daly, 400; affd. on opinion below, 78 N. Y. 608, and Cook on the Law of Stock, etc., § 278.)

I have, therefore, reached the conclusion as to this surplus of capital, left on hand after the reduction of the capital stock from $300,000 to $200,000, that it was not applicable to the claim of the preferred stockholders for the arrears of unpaid dividends. I am, equally, clear in the conclusion that, in making the distribution of the surplus profits arising from the conduct of the business, the directors were obliged to apply them, in first order, towards the satisfaction of all claims, which the preferred stockholders, at any time, held against the company, based upon arrears of unpaid dividends and the stipulated interest accrued thereon. Such was the express obligation of the corporation; which, so far as the record shows, has never been discharged or released.

I advise the reversal of the judgment appealed from and that the plaintiff appellant have judgment against the defendant respondent entitling her to be paid, from the surplus profits arising from the corporate business, the annual dividends of six per cent per annum in arrears upon her 250 shares, or $25,000, of preferred stock up to June 25th, 1904, and on her 167 shares, or $16,700, of such stock thereafter, with interest at the rate of six per cent per annum from the date

when each dividend was payable until the date of payment, before any dividend is paid upon the common stock, with costs to the appellant in both courts.

CULLEN, Ch. J., HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ., concur; EDWARD T. BARTLETT, J., dissents.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY METCALF, Respondent, *v.* WILLIAM MCADOO, as Police Commissioner of the City of New York, Appellant.

1. NEW YORK CITY — RETIREMENT OF POLICEMAN FOR DISABILITY. The phrase "unfit for duty," as used in section 355 of the charter of the city of New York (L. 1901, ch. 466), authorizing the compulsory retirement of police officers, means their inability to discharge with average efficiency the duties of the respective grades to which they belong. The fact, therefore, that a policeman is unable to perform full police duty, or every conceivable duty, does not of itself render him liable to retirement.

2. CERTIFICATE MUST BE SIGNED BY EXAMINING SURGEONS AS INDIVIDUALS, NOT AS A BOARD. The certificate of disability directed by the statute, "of so many of the police surgeons as the police commissioner may require," must be the personal act of each surgeon who aids in making it, not one that may conceal the persons acting through the signatures of the officers of a board.

3. INSUFFICIENCY OF CERTIFICATE. An order of the police commissioner of the city of New York dismissing a policeman from the force and placing him on the pension list, based upon a certificate of the board of surgeons that he was "unfit for the performance of full police duty," which was authenticated only by the signatures of the president and secretary, is without jurisdiction through lack of the proper statutory certificate of disability, and such policeman is entitled to reinstatement.

People ex rel. Metcalf v. *McAdoo*, 109 App. Div. 892, affirmed.

(Argued February 27, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 29, 1905, which affirmed an order of Special Term granting a peremptory writ of mandamus to compel the defendant to restore the relator to active duty as a sergeant of police in the city of New York.

The relator is a veteran, who, after four years of service as a soldier in the Civil war, on the 29th of October, 1866, was appointed a patrolman in the police force of the city of New York. In 1869 he was promoted to the position of roundsman and in 1876 to that of sergeant. He continued to serve in that capacity until the 9th of May, 1905, when, without a hearing and against his protest, he was dismissed from the force by the police commissioner under the following circumstances: On the 21st of February, 1905, the commissioner ordered the "Board of Surgeons" to convene at a time and place named "for the purpose of examining such members of the police force as may be designated by the Commissioner in reference to their physical condition and ability to perform full police duty." The relator was ordered before the board and was examined by three surgeons in the presence of the other members. As the examination proceeded the result "was called out to the secretary" and "such of the surgeons who deemed it necessary personally verified the examination made by the committee." On the same day the board reported to the commissioner that "as a result of said examination it was moved, resolved that we find Sergeant Henry Metcalf unfit for the performance of full police duty by reason of obesity, fatty heart and poor circulation." At the same time the board by resolution made the following certificate: "The Board of Surgeons of the Police Department of the city of New York do hereby certify that Sergeant Henry Metcalf of the 82nd Precinct is permanently disabled so as to be unfit for police duty; that the cause of such disability is obesity, fatty heart and poor circulation; that the nature of such disability is permanent; that the extent of such disability is such as to unfit him for the performance of full police duty; that the said disability was incurred or sustained by the said Sergeant Henry Metcalf whilst in the actual performance of police duty and by reason of the performance of such duty and without fault or misconduct on his part." Neither the report nor the certificate was signed by the surgeons who made the examination, but simply by the president

and secretary of the board. It did not appear how many or what members of the board voted for either resolution, and both of the officers who signed the certificate as well as the three surgeons who made the examination may have voted against both the resolution adopting the report and that by which the certificate was made.

In the month of May, 1895, the police commissioner, acting on this certificate, dismissed the relator from the force and placed him on the pension roll. He applied for a peremptory writ of mandamus, and it appeared from the moving papers that for the last fifteen years prior to his removal he had not lost a day on account of sickness, and during his entire service of thirty-eight years no complaint was ever made against him. In 1896 he was commended by a special order of the superintendent for bravery in saving a woman and child from drowning, and in 1897 he was presented with a medal for saving the lives of several persons. He had stood the test of two physical examinations by the surgeons of the municipal service commission, one of which was made about eighteen months before he was removed, and to the day of his retirement he did full police duty. On Decoration Day, 1905, he marched with the survivors of his old regiment a distance of five miles without fatigue.

Upon proof of these facts, among others which were not disputed, the Special Term made an order commanding the immediate reinstatement of the relator, and upon appeal to the Appellate Division that order was unanimously affirmed. The police commissioner now appeals to this court.

John J. Delany, Corporation Counsel (*James D. Bell* of counsel), for appellant. The certificate upon which the appellant acted was in the form required by the charter, as it contained the facts specified therein, and the objections to it are not well founded. (L. 1901, ch. 466, §§ 355, 357; *People ex rel. Appel* v. *Casey*, 66 App. Div. 211.) The certificate on which appellant acted in compulsorily retiring the relator is the certificate of so many of the police surgeons as he required

to make it, and is in substantial compliance with the provisions of the charter (L. 1901, ch. 466, §§ 294, 357). The certificate of relator's disability was, therefore, made by the police surgeons in substantial compliance with the charter provisions; the action of the police commissioner based thereon was within his jurisdiction, and relator's compulsory retirement was legal and effectual. (*People ex rel. Kennedy* v. *Brady*, 166 N. Y. 44; *Matter of Guden*, 171 N. Y. 529.)

Alfred E. Sander for respondent. Assuming that there is a provision in law for the compulsory retirement of a Civil war veteran, it has not been complied with in the case of this relator. (*People ex rel. Mitchell* v. *Martin*, 143 N. Y. 407; *Matter of Guess*, 16 Misc. Rep. 306; *Matter of Freel*, 38 N. Y. Supp. 143; 148 N. Y. 165; Merrill on Mandamus, § 274; Spelling Extr. Rel. § 1664; Fiero on Spec. Pro. 214, 215; *People ex rel. Kelley* v. *Common Council*, 77 N. Y. 511; *Matter of Sullivan*, 55 Hun, 288; *Matter of Pierce Co.*, 62 N. Y. 265; *People ex rel. McKenna* v. *Martin*, 1 App. Div. 420; *People ex rel. Jordan* v. *Martin*, 152 N. Y. 311.)

VANN, J. It is provided by the statute governing the subject that "any member of the police force being of the age of fifty-five years who has or shall have performed duty on such police force as aforesaid for a period of twenty years or upwards, upon his own application in writing, may, or upon a certificate of so many of the police surgeons as the police commissioner may require, showing a member of whatever age who has served twenty years is permanently disabled, physically or mentally so as to be unfit for duty, shall, by order of the police commissioner, be relieved and dismissed from said force and service and placed on the roll of the police pension fund * * *." (Charter, § 355.) Section 357, which relates to pensions, requires the certificate as to that subject to be made "by so many of the police surgeons as the police board may require" and to set forth "the cause, nature and extent

of the disability, disease or injury" of the member retired upon pension. It also provides in substance that without such a certificate "no member shall be retired upon pension or be pensioned."

The commissioner had no power to remove the relator without a certificate of the examining surgeons that he was permanently disabled so as to be unfit for duty. The statute does not say unfit for "full" duty, but the certificate does, and in this respect it follows the terms of the order requiring the relator to be examined. By that order the surgeons were directed to make the examination with reference to ability "to perform full police duty," which is a material departure from the language of the statute.

Fitness for police duty means the ability to discharge with average efficiency the duty of the grade to which the member belongs. A large police force must have some members of unusual ability who are peculiarly fit to discharge the duties of their positions. It must have some of a low degree of efficiency who are barely able to fill the requirements of the office. The statute refers to neither of these classes, but to the great mass of the force, representing its average efficiency. This idea is not expressed by the word used by the commissioner and the surgeons, which qualifies and extends the statute. "Full" means complete or the highest degree, pointing toward perfection. That is not the standard of the statute, and the false standard erected by the commissioner and followed by the surgeons may have resulted in injustice to the relator. He may be able to perform police duty, as he has for thirty-eight years with a faultless record of faithful service, without being able to perform full police duty or every conceivable duty, including service on the mounted squad, for instance. The word interpolated is liable to mislead even those who wish to do right, and it may be made a pretext to cover abuses by those who wish to do wrong. As was well said below: "One physically unfit to be a patrolman or a roundsman might be entirely fit to be an inspector, a captain or a sergeant. * * * He might not be as efficient as a younger

man; he might not be fit to do some minor or particular thing, and in that sense he might not be fully fit, and yet he might be substantially fit for duty and the surgeons would in honesty have to so certify. But this word 'full' in their certificate may refer to some trivial thing for which they would not certify the subject substantially unfit for duty, but might be persuaded to certify him unfit for 'full' duty. A very little thing might be all that this word would be used for. If the surgeons may interpolate it, they are enabled to make a distinction which rests in their own minds only and is not revealed."

It is true that the forepart of the certificate uses the language of the statute, but that general clause, in accordance with the usual rule of construction, yields to the specific words which follow, so that the effect of the certificate as a whole is that the relator is unfit for "full police duty," which is precisely what the commissioner directed the surgeons to ascertain and all that they stated in their report accompanying the certificate. The relator could not be dismissed simply for disability unless he was at once placed upon the pension roll. (§ 355.) He could not be placed on the pension roll without a certificate as to the "cause, nature and extent of the disability." (§ 357.) In stating the extent of his disability, which was an essential part of the certificate, it was described as "such as to unfit him for the performance of full police duty." The standard adopted, therefore, was fitness to perform full police duty, which does not conform to the statute.

Moreover, the statute calls for the certificate "of so many of the police surgeons as the police commissioner may require." This may include all the surgeons on the force in the discretion of the commissioner, but whether a part or all are designated the statute contemplates that each one selected and present shall personally examine, and that at least a majority of those examining shall certify to the disability. This requirement is not satisfied by the action of a board, authenticated only by the signatures of the president and

secretary. The old statute required a "certificate of the board of surgeons," but that was changed in the present charter, and it is the only material change made in the section in which it appeared. No board is now created by law, but only by order of the commissioner, and the certificate does not state how many of the forty police surgeons were present, or how many voted for the resolution adopting it. The statute does not say that the board of surgeons shall certify, but that the surgeons named for the duty shall certify, which means that they shall personally make the statement in writing on the responsibility of their own signatures. A large board acting by resolution and the vote of a majority may make a certificate which the individuals composing the board or even a majority of them would not sign. A weak or careless man may consent to a wrong if done in the name of another, when he would not consent to it over his own name. While we have no reason to believe that this was the fact in the case before us, it is our duty to consider what may be done by a board, as distinguished from individual action. The requirement of a certificate is a safeguard to the members of the force, held by the statute as a shield between them and compulsory removal without a trial. It is not only an appeal to the conscience of every surgeon who signs it to certify the truth, the whole truth and nothing but the truth, but it also identifies those who sign and charges each with responsibility for his action. The certificate should be the personal act of each surgeon who aids in making it and not one that may conceal the persons acting through the signatures of the officers of a board.

Further discussion is not required, as both questions were fully considered by the courts below, and we announce as our conclusion that the commissioner acted without jurisdiction for the want of such a certificate as the statute requires. The order should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, WERNER and HISCOCK, JJ., concur; WILLARD BARTLETT, J., not sitting.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWARD & JOHN BURKE, LIMITED, Appellant, *v.* JAMES L. WELLS et al., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

TAX — FOREIGN CORPORATION DOING BUSINESS WITHIN THE STATE — WHEN BILLS RECEIVABLE FOR GOODS SOLD IN ORIGINAL PACKAGES ARE TAXABLE AS CAPITAL EMPLOYED WITHIN THIS STATE — L. 1896, CH. 908, § 7. Bills receivable, belonging to a foreign corporation maintaining an office within the state for the sale of its products, which are imported into this country and sold in the original packages, are taxable as capital employed within this state within the meaning of the Tax Law (L. 1896, ch. 908, § 7), although such bills are the proceeds of imported goods sold in the original packages, where such bills are not *in transitu*, but are actually, and in the regular and permanent course of business, held within the state until maturity for the convenience of such corporation and the proceeds, in part, then remitted to the home office in a foreign country.

People ex rel. Burke v. *Wells*, 107 App. Div. 15, affirmed.

(Argued February 26, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 22, 1905, which affirmed an order of Special Term dismissing a writ of certiorari and confirming an assessment of the relator's property for the purposes of taxation.

The facts, so far as material, are stated in the opinion.

Edmund Wetmore for appellant. Under the Constitution of the United States neither the relator's imported goods in original and unbroken packages upon which duties had been paid, nor the proceeds of the sales of said goods by the importer in such packages, said proceeds being merely collected here and transmitted abroad, after deducting duties and expenses, were liable to taxation by the city of New York. (*Brown* v. *Maryland*, 12 Wheat. 419; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Fairbanks* v. *U. S.*, 181 U. S. 283; *People* v. *Maring*, 3 Keyes, 374; *W. U. Tel. Co.* v. *Alabama*, 132 U. S. 472; *Fargo* v. *Michigan*, 122 U. S. 230; *P. T. C. Co.*

v. *Adams*, 155 U. S. 688; *P. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Weston* v. *Charles*, 2 Pet. 449.) The proceeds of the relator's sales, consisting of cash and bills receivable, simply collected here and transmitted abroad, did not constitute capital invested in business in this state, and even if they could be so regarded they would still be exempt from taxation. (*Parker Mills* v. *Comr. of Taxes*, 23 N. Y. 242; *People ex rel. Y. P. Co.* v. *Barker*, 23 App. Div. 524; *People ex rel. Nat. S. M. Co.* v. *Feitner*, N. Y. L. J. March 15, 1899; *People ex rel. F. & O. Co.* v. *Wells*, 42 Misc. Rep. 423.)

John J. Delany, *Corporation Counsel* (*George S. Coleman* and *Curtis A. Peters*, of counsel), for respondents. The credits and moneys of the relator constituted capital invested in relator's business in this state and were, therefore, taxable. (*People ex rel. Crane* v. *Feitner*, 49 App. Div. 108; *People ex rel. C. M. Ins. Co.* v. *Comrs.*, 144 N. Y. 485; *People ex rel. W. U. Tel. Co.* v. *Tierney*, 57 Hun, 361; 126 N. Y. 166; *People ex rel. Y. P. Co.* v. *Barker*, 23 App. Div. 524; affd., 155 N. Y. 665; *People ex rel. A. C. Co.* v. *Barker*, 157 N. Y. 159; *People ex rel. F. & O. Co.* v. *Wells*, 183 N. Y. 264.) A tax imposed under section 7 of the Tax Law upon the credits and moneys of the relator does not contravene any of the provisions of the Federal Constitution. (*City of New York* v. *McLean*, 170 N. Y. 374; *Waring* v. *Mayor, etc.*, 8 Wall. 110; *Woodruff* v. *Perham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 621; *P. C. Co.* v. *Pennsylvania*, 141 U. S. 18; *P. T. C. Co.* v. *Adams*, 155 U. S. 688.)

CULLEN, Ch. J. The relator is a foreign corporation engaged at Dublin, Ireland, in the manufacture of spirituous and malt liquors. It has established and maintains an office in the city of New York for the sale of its products, which are imported into this country and sold in the original packages. The relator made application under the statute for

permission to carry on business in this state, and was granted such permission. In January, 1903, it was assessed for personal property in this state at the sum of $94,617.93 for three separate items — the value of its office furniture, $797.68; cash on hand and in bank, $6,122.63, and the remainder for bills receivable held in the city of New York.

The relator contends that so far as the last two items are concerned they do not represent capital employed in this state within the meaning of our Tax Law, and further that as they are the proceeds of sales in original packages they are not subject to taxation by the state. The first contention we will not discuss, as we deem the question settled by the recent decision of this court in *People ex rel. Farcy & Oppenheim Co.* v. *Wells* (183 N. Y. 264). As the point presented by the relator's second claim was not involved or at least not raised in the case cited, we will briefly consider it.

It is well settled that while imported goods are in the hands of the importer in the original packages they are not subject to taxation by the state, nor can any tax be imposed upon their sale by way of a license tax or percentage on the price for which they may be sold. But though no tax can be imposed either on the goods themselves or their sale, we find no authority for the proposition that the proceeds of the sales have a similar immunity from taxation. Doubtless, if the tax were imposed on the proceeds as such, and because they were derived from the sales of imported goods, it would be invalid, but if those proceeds have become part of the common mass of the property within a state, they are subject to taxation, of course without discrimination, the same as other property. In *Hibernia Savings & Loan Society* v. *City and County of San Francisco* (200 U. S. 310), the Supreme Court of the United States held that two checks on the United States treasury received by the appellant as interest upon certain registered government bonds held by it were taxable, though the bonds themselves were exempt from taxation. Justice BREWER there said: "Had the plaintiff drawn the money immediately upon these cheques it

would have become at once a part of the general property of the bank, and the fact that the money had been derived from the United States and paid to the bank as interest on its obligations would not have prevented its becoming part of the general property of the bank, and subject to state taxation."

The real question in this case, therefore, is whether the property on which the relator has been taxed, though belonging to a non-resident, had acquired such a situs within this state as to be subject to taxation — a question that does not depend on the source from which the property was derived. We assume that if a non-resident sold within this state property which under the Federal Constitution was immune from taxation, such as imported goods in the original packages or government bonds, and forthwith transmitted the proceeds of the sale without the state, the proceeds would not be subject to local taxation simply because in the course of transmission they happened to be physically within the state on assessment or listing day; at least the legislature has never attempted to subject such money or property to taxation. The question seems to us to be substantially the same as that which has been several times presented as to the right of the state to tax property in course of transportation through its limits to other states, for we see no difference in principle in this respect between foreign and interstate commence. "The law on this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities." (*Kelley* v. *Rhoads*, 188 U. S. 1; see *Diamond Match Co.* v. *Ontonagon*, Id. 82; *Brown* v. *Houston*, 114 id. 622; *Pittsburg, etc., Coal Co.* v. *Bates*, 156 id. 577.)

The evidence appearing in this record as to the exact manner in which the relator carried on its business in the city of

New York is meagre, but the presumption is that the determination of the assessors was correct, and to relieve itself from the assessment it was incumbent upon the relator to clearly show that the assessment was erroneous. (*People ex rel. Westchester F. Ins. Co.* v. *Davenport*, 91 N. Y. 574.) It is true that at one point in the return to the assessors, the relator's agent states that the proceeds of the sales of the goods are at once remitted to the main office in Dublin after reserving the necessary amount for paying the expenses of the business conducted in the city of New York. But this is qualified by the subsequent statement that the amounts of the bills receivable and bank accounts are invested in the city of New York. It was not denied that the notes were physically in the state of New York, and it was admitted upon the argument that both the notes and open accounts were held in New York until maturity, there collected and after collection the proceeds remitted to Dublin. It is plain that the moneys deposited in bank, so far as they are retained for the payment of duties and expenses of the New York office are in no sense in the course of transmission abroad. The duties referred to in the statement must be duties to be paid on other goods which the relator might subsequently import or sell, not the goods which had been sold, for as we understand it, duties must be paid in advance of taking the goods out of the custom house. We cannot see that the condition of this bank deposit in any way differs from other bank deposits of non-residents, and it seems to be settled by authority that the bank deposits in this state of a non-resident are subject to taxation by the state. (*New Orleans* v. *Stempel*, 175 U. S. 309; *Blackstone* v. *Miller*, 188 id. 189.)

It is also settled that the situs for the purpose of taxation of promissory notes and similar instruments for the payment of money where the "debt is inseparable from the paper which declares and constitutes it," is the place where they are actually and physically held. (*State Tax on Foreign Held Bonds*, 15 Wall. 300; *New Orleans* v. *Stempel* and *Black-*

stone v. *Miller*, *supra*; *People ex rel. Westbrook* v. *Board of Trustees Vil. of Ogdensburgh*, 48 N. Y. 390.)

Therefore, unless these notes were in course of transmission to the home office of the relator in Dublin, they were properly assessed. But they were not *in transitu*; they were held here until maturity for the convenience of the relator and the proceeds in part then remitted. The case does not seem to differ in principle from one where a non-resident, equally for his convenience, deposits his securities with an agent within the state for custody and collection, and in such case it has been held that such notes and securities are subject to taxation in the state where they are on deposit. (*New Orleans* v. *Stempel*, *supra*.) It is also to be observed that in the case before us the retention of the notes in this state was not casual or exceptional, but in accordance with the relator's regular and permanent course of business.

We think it is not necessary to consider whether the open accounts present a different question from that involved in the notes. As already stated, it was incumbent upon the relator to distinctly point out any error committed by the assessors, and if part of the bills receivable were not subject to taxation, it should have shown what the amount of that part was.

The order appealed from should be affirmed, with costs.

HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur; O'BRIEN, J., dissents.

Order affirmed.

HELEN S. HOLMES, Respondent, *v.* NORTH GERMAN LLOYD STEAMSHIP COMPANY, Appellant.

CARRIERS — LIMITATION IN PASSAGE TICKET AS TO LIABILITY FOR LOSS OF BAGGAGE. A provision in a passage ticket issued by a steamship company limiting its liability for loss of luggage or personal effects of passengers to $100, "unless the value of the same in excess of that sum be declared at or before the issue of this contract, or at or before the delivery of said luggage to the ship, and freight at current rates for

every kind of property is paid thereon," cannot be held to apply to hand baggage intended to be taken by the passenger to her stateroom for use during the voyage, but only to such as might be delivered to the defendant to remain in its possession until delivery at the termination of the voyage, and where hand baggage delivered to the company's baggage-master, at his direction and upon his statement that it would be sent to the passenger's room, is never delivered, the loss, if unexplained, establishes a *prima facie* case of negligence and the company is liable for the full value of the lost articles notwithstanding the failure of the passenger at the time of delivery to declare the value thereof or to pay excess freight thereon.

Holmes v. *North German Lloyd S. S. Co.*, 100 App. Div. 36, affirmed.

(Argued January 26, 1906; decided March 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 20, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph Larocque, Jr., for appellant. By accepting the contract ticket and failing to declare the excess value of her luggage and paying freight thereon the plaintiff precluded herself from claiming more than $100. (*Steers* v. *L., N. Y. & P. S. S. Co.*, 57 N. Y. 1; *Wheeler* v. *O. S. N. Co.*, 72 Hun, 5; *Belger* v. *Dinsmore*, 51 N. Y. 166.) The fact that the agreement does not specifically refer to losses occasioned by the negligence of the carrier does not deprive the defendant of the benefit of the valuation clause. (*Condict* v. *G. T. R. Co.*, 54 N. Y. 500; *Tewes* v. *N. G. L. S. S. Co.*, 42 Misc. Rep. 148; *Hart* v. *P. R. R. Co.*, 112 U. S. 331; *The Kensington*, 183 U. S. 263; *Magnin* v. *Dinsmore*, 62 N. Y. 35; *Rowan* v. *W., F. & Co.*, 80 App. Div. 31; *Ghormley* v. *Dinsmore*, 2 J. & S. 36; *North German Lloyd* v. *Heule*, 44 Fed. Rep. 100; *Bermel* v. *N. Y., N. H. & H. R. R. Co.*, 62 App. Div. 389; *Zimmer* v. *N. Y. C. & H. R. R. R. Co.*, 137 N. Y. 460.)

W. C. Carroll and *Loran J. Lewis, Jr.*, for respondent. The clause in the ticket issued to the plaintiff limiting the liability for the loss of luggage to $100 does not apply to hand luggage to be in the possession of the passenger, and the mere fact of the non-delivery of the two suit cases in question is *prima facie* evidence of negligence. (*Wheeler* v. *O. S. N. Co.*, 125 N. Y. 155; *Tewes* v. *N. G. L. S. Co.*, 42 Misc. Rep. 148; 104 App. Div. 619.) The regulations in the ticket should be strictly construed. (Bishop on Cont. §§ 410, 411; *Mynard* v. *S., etc., R. R. Co.*, 71 N. Y. 180; *Jennings* v. *G. T. Ry. Co.*, 127 N. Y. 438.) In the case of a passenger upon a steamship, after the company has issued its ticket and furnished a stateroom for the passenger, and receives the passenger and his personal effects, the relationship of innkeeper and guest at once arises. (*Lincoln* v. *C. M. S. S. Co.*, 30 App. Div. 752.)

CULLEN, Ch. J. This action was brought to recover damages for the loss of two suit cases under the following circumstances: The plaintiff and her daughter were cabin passengers in one of the appellant's steamers sailing for Europe on the 17th of September, 1903. The passage ticket was purchased some twenty days prior to the date of sailing and from that time was in the possession of the plaintiff. The ticket contained the following provision printed on its face: "It is mutually agreed that this ticket is issued by the North German Lloyd S. S. Co. and accepted by the passenger on the following conditions: * * * It is also agreed that neither the shipowner nor the passage broker or agent nor the ship, is in any case liable for loss of or injury to or delay in delivery of luggage or personal effects of the passengers beyond the amount of one hundred dollars ($100), unless the value of the same in excess of that sum be declared at or before the issue of this contract, or at or before the delivery of said luggage to the ship, and freight at current rates for every kind of property is paid thereon." On the day of sailing the plaintiff with her daughter and husband drove to the

defendant's pier in Hoboken; her baggage was taken from the cab, and two trunks were delivered to the baggage master and receipts taken therefor. The plaintiff and her husband started to carry the suit cases to her cabin or stateroom when they were directed by the baggage master to place the suit cases with the other baggage and he stated that they would be carried to the room. The baggage master also told her that no receipts were given therefor. The suit cases were never delivered to the plaintiff at her cabin or elsewhere, but were lost. The value of the property was stipulated at six hundred dollars. The defendant did not deny its responsibility for the loss of the property, but contended that under the provision of the passage ticket hereinbefore recited its liability was limited to one hundred dollars and that is the only question presented by this appeal, the trial court having awarded the plaintiff judgment for the full value of the lost articles.

The ground on which the decisions of the courts below have proceeded was that the plaintiff was not obliged to declare the value of her baggage until after it was actually placed upon the ship and that by its loss before that time she was prevented from making such a declaration. We place our decision on a different ground. We are of opinion that the provisions of the passage ticket did not apply to baggage intended to be taken by the passenger to her stateroom for use during the voyage, but only to such as might be delivered to the defendant to remain in its possession until the termination of the voyage. The difference between the two classes of baggage in respect to a carrier's liability therefor has given rise to many conflicting decisions in the courts, and the law thereon differs in different jurisdictions. As to baggage of a passenger delivered to its exclusive possession, the carrier assumes the full liability of a common carrier and is an insurer. (*Powell* v. *Myers*, 26 Wend. 591; *Merrill* v. *Grinnell*, 30 N. Y. 594.) This doctrine obtains everywhere so far as we know. But as to baggage which remains, to some extent at least, in the personal cus-

tody of the passenger, a different rule exists, and the carrier is liable only for negligence. This distinction generally prevails, though there is conflict in the authorities as to when the personal control exercised by the passenger excludes a possession by the carrier and relieves the carrier from its strict liability. The distinction prevails in this state in the case of railroads, and it has been held that a company is not liable for the theft of an overcoat taken from a seat in a car, nor for articles stolen from the berth of a sleeping car, except in case of negligence. (*Tower* v. *Utica & Schenectady R. R. Co.*, 7 Hill, 47; *Carpenter* v. *N. Y., N. H. & H. R. R. Co.*, 124 N. Y. 53.) In the case of a steamboat or steamship which provides cabins or staterooms in which the passenger is expected to deposit the baggage needed for his voyage and to retire to rest, the responsibility of the carrier is that of an innkeeper, and the company is liable for moneys stolen from the clothes of the passenger which he has taken off on retiring to sleep. (*Adams* v. *New Jersey Steamboat Co.*, 151 N. Y. 163.) This principle would equally control a loss of any other property of the passenger stolen from his stateroom. We think that the agreement contained in the passage ticket was not intended to relieve the defendant from liability for baggage of this character. In terms it purports to include not only the luggage of the passenger, but his personal effects. Surely it was not expected that the passenger should make a declaration of the amount of money he had on his person or the value of the watch and jewelry he carried or of the clothes he was wearing, of his overcoat and his wraps. Had the suit cases not been lost it is entirely possible that the plaintiff might before dinner time or at least the next morning have substituted a dress and other articles of apparel from the suit cases for those she wore going on board the steamer. Thus the contents of this baggage would have been constantly shifting during the voyage and probably the value equally changing. The language of the ticket, which is to be construed against the carrier and every ambiguity in which is to be resolved in favor of the passenger, supports the view that it

was not intended to include baggage taken by the passenger in his cabin for use during the voyage. It provides that if the value of the baggage and personal effects of the passenger exceed one hundred dollars, freight at current rates shall be paid thereon, and also that baggage shall be distinctly labeled, and in case of neglect so to do the company shall not be liable for loss or delay in its delivery. Certainly it could not have been expected that the personal effects of the passenger taken into his cabin or stateroom, the use of which changed from day to day or during the same day, should be paid for as freight or those articles distinctly labeled. The conduct of the baggage master equally confirms this interpretation of the provision. Receipts were given for the trunks, not for the cabin baggage.

It is unnecessary to determine whether the liability of the defendant in what may be termed the incidental service of carrying the passengers' hand luggage from the wharf to the stateroom was that of an insurer or merely for negligence. The loss of the suit cases unexplained established a *prima facie* case of negligence and no explanation was given. The service thus rendered was not a voluntary one on the part of the employee outside of the scope of his duty, for it is the common custom of the stewards and other employees of an ocean steamer to carry the cabin baggage of the passengers on and off the boat.

The judgment appealed from should be affirmed, with costs.

GRAY, J. (dissenting). I am unable to concur with the chief judge's opinion. It ignores, or nullifies, a contract of the parties and reaches its conclusion by importing into their unqualified agreement a restriction upon its general terms. The contract of carriage is perfectly plain, and the agreement in question is conspicuously and legibly printed upon the ticket and is quite unambiguous. The contract was to carry the plaintiff and her children from New York to Cherbourg, in the first cabin of one of defendant's steamers, sailing at a specified date, for the sum of $200. Immediately following,

in heavy type, are the words that "it is mutually agreed that this ticket is issued by the North German Lloyd Steamship Co. and accepted by the passenger on the following conditions." Equally legible among the five conditions referred to is the one that "it is agreed that neither the ship owner * * * nor the ship is in any case liable for loss * * * of luggage or personal effects of the passengers beyond the amount of one hundred dollars, unless the value of the same in excess of that sum be declared * * * at or before the delivery of said luggage to the ship," etc. That was an agreement between the parties that "*in any case*" of liability for a loss, the valuation of the passenger's "luggage, or personal effects," was fixed at $100; but it might be declared to be in excess of that sum up to the moment of plaintiff's delivery to defendant. Language could not more comprehensively, I think, express an agreement between the defendant and its passenger with respect to that feature of their relations. If the agreement was not to be taken so positively, as to the limit of the defendant's liability for the passenger's loss; if any exception was intended to the application of the agreement, it would have been very easy and very natural to have so stipulated. The passage agreement was deliberately made; there was ample opportunity for the plaintiff to regulate her actions accordingly and she had been a frequent passenger by this line.

By accepting the ticket for the intended passage, she declared her acceptance of its terms and the relative rights and agreements of the parties became obligatory. The agreement as to the valuation of the luggage was for their mutual advantage. It guarded the defendant against fraud and its price for the carriage, presumably, was measurably based upon the limited liability. It advantaged the plaintiff; because, while liquidating the value of her portable effects "in any case of loss," it allowed her to declare, up to the time that the defendant assumed any responsibility therefor, a greater value. An undue importance seems to be attributed by Judge CULLEN to the language "freight at current rates to

be paid" on any excess in value over $100. The term "freight," however, is but the technical term to express the price to be paid for the carriage, or transportation, of goods and was the phraseology proper to be used in an agreement to pay for any increased assumption of liability over what had been fixed by agreement. The ticket was intended to regulate the mutual rights and obligations of the parties from the moment that relations commenced between them and no one can, in my opinion, with reason, or with justice, read its plain terms with other effect. Those relations commenced and the passage contract became operative, when the plaintiff arrived at the defendant's pier and claimed the right to have herself and her effects carried. She chose to surrender her effects to the defendant's servants. She was not obliged to do so and she might have retained the custody of the suit cases until deposited where she should choose to deposit them. She did not so elect. When she delivered them to the baggage master, she delivered them to the defendant, and how could it be material to the contractual relation, or affect its terms, whether its custody and care were for the whole voyage, or for a shorter time? The moment the defendant became responsible for them at all, the liability, necessarily, was measured by the value theretofore agreed upon; if not then otherwise declared. Is it just to hold that she was excused from declaring to the defendant's agent, when delivering her effects into his custody, that they were of considerable value and in excess of $100? Was the defendant not to be apprised, in fair dealing, of the greater value? If, as we must assume, the price of the passage was proportioned to the liability agreed upon, then there is no justice in allowing the plaintiff to be paid a larger value for her suit cases. We may apply the observation in *Hart* v. *Penna. R. R. Co.*, (112 U. S. 331), though the carriage contract there related to a shipment of horses, that "it is just to hold the shipper to his agreement, fairly made, as to the value, even where loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight

and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to the value, in this case, stands as if the carrier has asked the value of the horses and had been told by the plaintiff the sum inserted in the contract." It must be borne in mind that this contract did not seek to exempt the carrier from negligence; but, to the contrary, contemplated the possible case of negligence causing loss and liquidated the damage in such event at a sum named. There is no analogy with the innkeeper's liability. It was not like the theft of an article from the cabin of the passenger. It was, purely, a case of the failure of the carrier to adequately care for the luggage delivered to it. A passenger may take all of his luggage in his cabin; or he may send a part of it to the ship's hold. In either case, he will intrust all, or only some portions, to the carrier and how can it affect the question of the latter's liability, whether the delivery by it to the passenger is to be made at the end of the voyage, or after the voyage has commenced? To say that there may be a hiatus in the relation of a carrier to its passengers and that there can be an interval of time, when, notwithstanding that the luggage had been delivered to the former, no contractual relation existed between the parties, is as illogical, as it is unreasonable. Whenever delivered to the carrier, upon the inception of the contractual relation, the obligation of the latter attaches and requires a delivery to the passenger at some time before, or at, the end of the voyage, as arranged.

In *Steers* v. *Liverpool, N. Y. & P. S. S. Co.*, (57 N. Y. 1), a trunk, which the plaintiff had delivered to the defendant, was never found. Her passage ticket contained the limitation, in the case of a loss of luggage, that not "in any event, shall the passenger demand beyond the sum of fifty dollars ($50), at which said Baggage is valued, unless a bill of lading or receipt be signed therefor, specifying the articles and their respective values." The defendant was held liable for the loss of the trunk; but the amount of the recovery was

limited to the specified sum of fifty dollars. In that case it appeared that the plaintiff had not even seen her ticket until she arrived at Queenstown; but that was not considered to be of importance. The opinion of the court pointed out the difference between the purchase of such a ticket and that of a railway ticket, or the taking of an express company's receipt, and held the plaintiff's ticket to be a contract between the parties, mutually assented to, touching the voyage in question and controlling. In *Wheeler* v. *Oceanic Steam Navigation Co.*, (72 Hun, 5; affd., 149 N. Y. 576), the plaintiff sued for the value of a certain package, which the defendant had received from her and had stated to her it had placed upon the steamer; but which was never, subsequently, delivered to her. Her passage ticket contained an agreement limiting the company's liability to an amount not exceeding £10, which she said she had never noticed; but it was held that the amount of her recovery should be limited to the sum stated in the ticket, which constituted a contract between the parties.

However we look at the present case, we find a contract, which is quite unobjectionable. The fact is that the parties agreed as to the measure of the defendant's liability, "*in any case*" of a loss of luggage or personal effects, and it is futile to generalize upon the situation and to conclude that something else was meant. Neither the nature of the liability nor the cause of the loss, could have any effect upon the agreed value of the luggage in the event of its loss.

For these reasons, I vote for the reversal of the judgment and that a new trial should be ordered.

EDWARD T. BARTLETT, HAIGHT and CHASE, JJ., concur with CULLEN, Ch. J.; O'BRIEN and WERNER, JJ., concur with GRAY, J.

Judgment affirmed.

CHARLES B. WOOD, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

1. TRESPASS — LIABILITY FOR RESULT OF UNINTENTIONAL ENCROACHMENT. An encroachment by a railroad company upon land adjoining its right of way, even though unintentional, constitutes a trespass for which it is liable.

2. NEGLIGENCE — WHEN CONTRACTUAL RELATIONS BETWEEN PLAINTIFF AND DEFENDANT WILL PREVENT RECOVERY FOR PERSONAL INJURIES. Where, in an action to recover for personal injuries, it appears that in the construction of a railroad switch the workmen went beyond the limits of the company's lands and excavated and set up the switch on adjoining premises which were occupied by its station agent, who, on a dark night, while passing along a path on said premises, fell into the excavation and was injured; that the excavation and switch in question were close to the station; that it was the plaintiff's duty as station agent to keep the station grounds in proper condition for the comfort and convenience of patrons, to know all switches at the station were in safe condition for use and the signals in proper working order; that the plaintiff had been notified of the completion of the switch, but, according to his own testimony, had failed to inspect it and was ignorant of its location or condition; a motion for a nonsuit should be granted, since, though defendant is liable for trespass, the plaintiff, by reason of his contractual relations with defendant, cannot recover for his personal injuries, for if, upon notification of the completion of the switch, he had discharged his plain duty of inspection, he would have been apprised of its location and condition and the accident would have been avoided.

3. TRIAL — ERRONEOUS CHARGE. An instruction in the charge, to the effect that neither the notification to the plaintiff nor his duty as station agent called upon him to personally inspect the switch or to have personal knowledge that any excavation made in connection with its construction had been filled in or properly guarded, is erroneous, since such notification did impose upon him this duty.

Wood v. *N. Y. C. & H. R. R. R. Co.*, 100 App. Div. 511, reversed.

(Argued February 8, 1906; decided March 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 11, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry Purcell for appellant. Upon the plaintiff's own evidence, it does not appear either directly or by inference that he exercised any care or caution whatever. (*Wallace* v. *C. V. R. R. Co.*, 138 N. Y. 302; *Kaare* v. *T. S. & I. Co.*, 139 N. Y. 369; *Williams* v. *D., L. & W. R. R. Co.*, 116 N. Y. 628; *Appell* v. *B., N. Y. & P. R. Co.*, 111 N. Y. 550; *De Forest* v. *Jewett*, 88 N. Y. 264.)

F. B. Pitcher for respondent. The plaintiff was free from contributory negligence. (*Ostrom* v. *Greene*, 161 N. Y. 353; *Fejdowski* v. *D. & H. C. Co.*, 168 N. Y. 500; *C. C. Mfg. Co.* v. *S. Ins. Co.*, 169 N. Y. 304.)

CULLEN, Ch. J. The action was brought to recover damages for personal injuries suffered by the respondent on October 16th, 1901, by falling into an excavation dug by the defendant, against a derailing switch there placed. The plaintiff was a station agent of the defendant at Evans, in Jefferson county in this state. He had been in the employ of the defendant some eight or ten years and at the station named for two and a half years. Evans is a small hamlet of about four hundred inhabitants. The plaintiff occupied as his home a plot of land adjacent to the station grounds, leased by him from one Croissant, the owner. Two days before the accident the defendant commenced the construction of a derailing switch on one of its sidings. This work was in charge of the supervisor of tracks and was done by the workmen in his department. In constructing the switch the defendant's workmen went beyond the limits of the defendant's lands and the excavation was made and the switch set up on the premises occupied by the plaintiff. The plaintiff had been in the habit of going from his house to the station building by a path across his own premises to the defendant's land. The excavation and switch were in the line of this path. On the night of the accident, which was dark and rainy, the plaintiff

started about half-past eight o'clock along this path from the door-yard in front of his house to go to the station building. He fell into the excavation, striking upon the switch or switch handle, and received the injuries which are the subject of this suit. The complaint alleged the possession of the premises by the plaintiff, the defendant's trespass thereon and its negligence in leaving the excavation unguarded, and he sought recovery, not for the trespass on the land, but for his personal injuries. He testified that he did not know of the presence of the switch at the point of his injury or the existence of the excavation. On the first trial of the action the complaint was dismissed; the Appellate Division reversed this judgment and granted a new trial. On the second trial the plaintiff recovered and that judgment has been affirmed by the Appellate Division by a divided court.

We think the learned trial judge was right in holding as a matter of law upon the proofs that the location of the switch was upon the plaintiff's premises, the testimony relied on by the defendant to establish the contrary of this proposition being insufficient to raise an issue as to the fact. The encroachment on the plaintiff's land was some three or four feet and presumably the defendant's employees were unaware at the time that they were encroaching on the plaintiff's land. This, however, did not relieve the defendant from the liability for the trespass. Though the workmen testified that the plaintiff saw the construction of the switch and conversed with them about it, making no complaint of the location, this was denied by the plaintiff and his implied acquiescence was, at most, a question of fact for the jury, which has been resolved in his favor. The defendant was liable for the results of its trespass and we assume that if the plaintiff had not borne any relation to the defendant his recovery for personal injuries would be upheld. At the time of the accident, however, the plaintiff was the station master of the defendant. Of course, the fact that he was in its service gave the defendant no right to trespass on his property, but under his employment there were imposed upon him duties concerning this

switch which, if they had been discharged, would have prevented accident to himself or to third parties. Under the rules of the defendant it was the duty of the station agent to "have charge of the business of the company at the station, all property connected therewith, and all persons employed thereat. Keep the station and grounds in proper condition for the comfort and convenience of patrons. * * * They must know all switches and frogs at their stations are in safe condition for use, and that all signals are in proper working order and must take every precaution to insure the safety of trains. Be responsible for the care and display of switch lamps (unless otherwise ordered), and see that they are lighted from sundown to sunrise." Of the effect of these rules the learned judge writing for the majority of the Appellate Division said: "In a general way the station agent was undoubtedly charged with general supervision of the property at and around the station. Under ordinary circumstances, as between him and the defendant, he was undoubtedly charged with the duty of knowing that the switches and signals were in working order around the station. But manifestly the rules upon this subject applied to switches and signals which were in use and operation. Concededly the switch in question was not in safe condition for use while it was being constructed, and we do not think that it can be said, at least as a matter of law, that plaintiff was so charged with the duty of keeping watch of it while it was being put in and before it was completed, that it can be held that he knew all about its condition and the means and details which were being employed to get it into a condition where it could be operated." We agree with this statement so far as it relates to the nature of the duty imposed upon the plaintiff. The construction of the switch was done by a different department of the road and we do not suppose that the station agent was required to supervise that construction or be responsible for negligence or error in its construction. But it was his duty at all times to "keep the station grounds in proper condition for the comfort and convenience of patrons." Therefore, there must have rested upon him

some responsibility, of however general a character, to overlook and familiarize himself with the station grounds, see what was being done there that might endanger safety or security of the patrons, and take some reasonable precautions to obviate the danger. Yet the plaintiff testifies that though this switch was only 125 feet from the station building, and the men employed in putting it in in view from that point, and though the path from the station building to his house (another than the one hitherto mentioned), which he says he used during the work on the switch, passed within a few feet of where the men were working, and he had seen that a number of ties had been brought to the point, he was not aware of the nature or condition of work that then was being done. The switch itself was completed, as I construe the evidence, on the 15th of October, the day before the accident, though it may be there were excavations around it that should have been filled up. On that day a telegram was sent from the superintendent of bridges and maintenance to the trainmaster at Watertown that a "derailing switch, provided with lock, has been put in Lawton siding that connects with our passenger track at Evans." This telegram was sent by mail by the trainmaster to the plaintiff with the instruction indorsed thereon, "note and return." It was received on the 16th by the plaintiff, who acknowledged its receipt and sent it back to the trainmaster. That the purport of this telegram was to notify the plaintiff that a completed switch had been put in is conceded. Assuming, as we must, from the verdict of the jury, that the plaintiff's testimony as to his ignorance of the switch was true, and further assuming that until this time proper supervision of the station grounds might not have given him notice of the existence and location of the switch, what then became his duty? He was required under the rules to see that the switch was in safe condition for use and the signals in proper working order. He was required to furnish a switch lamp and see that the lamp was lighted from sundown to sunrise, though it is claimed a lamp was required to be set only for switches on the main line

Yet, with this notice from his superior, he took no action whatever. He did not go to the switch to see if it was in working order; he did not provide a lamp for it, nor see that it was set, nor did he give his assistant, the operator, any instructions. On the contrary, the information imparted by the notice seems to have been wholly ignored by the plaintiff. Had the plaintiff inspected the switch, the accident would not have occurred. The learned judge who wrote below said that the rules applied only to switches and signals in use and operation, not in process of construction. Now, as already stated, the switch proper was completed, but assuming that it was not complete, the plaintiff was informed that it was. According to his testimony he was ignorant of its condition. The only way that he could tell whether in fact it was or was not complete or in working order was by going to see. The question as to the completion of the switch is not the controlling one. The real question is as to the plaintiff's duty when he was told the switch was complete, whether in fact it was so or not. Had the plaintiff discharged what seems to us to have been his plain duty to the defendant upon the receipt of the telegram, he would have been apprised of the location and condition of the switch, and the accident to him been avoided. The defendant's motion for a nonsuit should, therefore, have been granted. Of course, the defendant would remain liable for damages caused by its trespass pure and simple, but no recovery is asked therefor in this action.

There was further error committed on the trial. The learned trial court, on the request of the plaintiff and in accordance with the opinion of the Appellate Division on the former appeal, charged the jury: "That neither the telegram received by the plaintiff, his indorsement thereon nor his duty as station agent, called upon him to personally inspect the switch or have personal knowledge that any excavation made in connection with the construction of the same had been filled in or properly guarded." Under the view already expressed, the receipt of the telegram did impose upon him

this duty; at least, the question was one of fact for the jury, not of law for the court.

It has been suggested that the plaintiff may have known of the location of the switch and forgotten it. But the evidence does not warrant such a claim. The plaintiff asserts that he did not at any time know the location of the switch, and there is no pretense that after the receipt of the telegram he examined it. The question, therefore, remains whether in that condition of ignorance it was not his duty, on receipt of the telegram, forthwith to see that the switch was in working order, even though he may not have been required to set a light upon it, because the switch was not on the main line.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

CHASE, J. (dissenting). The defendant was not only a trespasser in making the excavation into which the plaintiff fell, but its liability for negligence is not seriously disputed. I do not agree that the plaintiff, by reason of his contractual relation with the defendant, is prevented as a matter of law from recovering for his personal injuries.

The duty of the station agent relating to the derailing switch was materially different and less exacting than his duty in relation to the switches in the main line of track. The derailing switch in question was placed in a side track known as "Lawton's Siding," which is a side track running from defendant's main track at a point west of the passenger station to a storehouse east of the passenger station and the highway and in front of the plaintiff's house. The grade of that side track descends to the west to such an extent that if the brakes on a car standing on the side track should be released by accident or design, it would allow the car to run by gravity upon the main track and cause a collision with a train if then standing on the main track or obstruct the main track if the car entered upon it. The purpose of putting in the derailing switch in question is stated by the supervisor of tracks, who constructed it, in these words: "The Lawton siding was on a

heavy grading after you get beyond the straight, and our passenger trains used that track every day at that time, and I guess they do yet, No. 4 and No. 7 as a passing track. The east-bound train takes the siding to pull out, No. 7 going towards Massena Springs. They stand right there and a car is liable to run down into the side of the coaches and injure the passengers and cause an accident. In order to prevent that we put in a derailing switch there to put the car on the ground in case it would come while there was a train going in or out there. At Mr. McCormick's, the trainmaster's, suggestion it was put in."

On the night when this accident occurred there were no cars on the side track that could run down upon the main track. The switches from the main track were lighted, and it appears by uncontradicted testimony that derailing switches are not provided with lights, and in this case particularly there was no reason for lighting the derailing switch as no cars were standing east of it, and it does not appear that cars were run upon that siding during the hours between sunset and sunrise. Lights are not provided for such derailing switches because there is no reason therefor. It does not appear but that the station and grounds were in proper condition for the comfort and convenience of patrons, and there is no controversy but that the derailing switch in question was safe for use so far as the safety of trains is concerned. In view of the facts that lamps are not provided for derailing switches, and that there was no special reason relating to the safety of trains for maintaining a light at the derailing switch in question, I do not see that plaintiff failed to perform any contractual obligation resting upon him so as to charge him with contributory negligence preventing a recovery in this action. The construction of switches and the maintenance and supervision of tracks belong to another department of the defendant's work.

The plaintiff's duty, as stated in the rules, was general and the purpose of imposing it upon him is expressly stated to have been to promote the comfort and convenience of patrons and to

insure the safety of trains. This accident occurred on property in the plaintiff's possession, and immediately before he reached the defendant's grounds. He had not failed to perform any duty affecting the comfort and convenience of patrons, and it does not appear that this or any other switch was not in a safe condition so far as the operation of trains is concerned. The place in which he was injured was not one that affected the comfort and convenience of patrons, and the exact location of the excavation and the failure to properly fill the same after the switch was completed in no way affected the operation or safety of the defendant's trains. The plaintiff undoubtedly had some knowledge that work had been done in the construction of a derailing switch in the Lawton siding. He testified that he did not know of its exact location, and the jury must have found that plaintiff told the truth as to his knowledge and lack of knowledge of the derailing switch. The plaintiff assumed that the employees in the defendant's construction and operating department had not trespassed upon and left a dangerous excavation upon his lands, and that it was safe for him to walk on and from his lands in the path where he had been accustomed to walk. Even if he failed to remember for the moment that work had been performed on the defendant's grounds that would suggest special care on his part while proceeding in the darkness after arriving thereon, he was not guilty of contributory negligence, as a matter of law, in what he did. (*Weed* v. *Village of Ballston Spa*, 76 N. Y. 329; *Dollard* v. *Roberts*, 130 id. 269; *Kaiser* v. *Washburn*, 55 App. Div. 159.) There may be doubt whether the plaintiff sustained the burden of proof incumbent upon him relating to contributory negligence, but there is some evidence to sustain the conclusion of the jury, and their determination of the question of fact cannot be reversed by this court. The judgment should be affirmed, with costs.

O'BRIEN, HAIGHT and WILLARD BARTLETT, JJ., concur with CULLEN, Ch. J.; EDWARD T. BARTLETT and VANN, JJ., concur with CHASE, J.

Judgment reversed, etc.

In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of JOHN W. DAVIS, Deceased.

CHARLES ADSIT et al., as Executors, Appellants; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

1. TRANSFER TAX — WHEN TESTATOR STOOD "IN THE MUTUALLY ACKNOWLEDGED RELATION OF A PARENT" TO A LEGATEE, SO THAT THE LATTER IS ENTITLED TO EXEMPTION UNDER THE STATUTE (TAX LAW [L. 1896, CH. 908], § 221, AS AMD. BY L. 1898, CH. 88, AND L. 1901, CH. 458). Where it appears upon the appraisal of the estate of a testator under the statute relating to taxable transfers of property, that a legatee of the testator, when a child about six years of age, was taken, upon her mother's death, from the home of her father to the home of her aunt, who was the wife of testator, where she continued to live as a member of his family until his death, a period of over thirty years, and that during her infancy she was supported and maintained at the expense of the testator and was subject exclusively to his control and that of his wife, the father in no respect contributing to her support nor exercising any direction over her, it is properly held that such legatee sustained to the testator the relation of a "child to whom any such decedent * * * for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relation began at or before the child's fifteenth birthday and was continuous for said ten years thereafter" (Tax Law [L. 1896, ch. 908], § 221, as amd. by L. 1898, ch. 88, and L. 1901, ch. 458), so that her legacy is taxable only at the rate of one per cent on the excess above $10,000; the fact that such legatee did not address her uncle and aunt as father and mother, nor they call her daughter, is of slight, if of any, importance, since being the niece of the testator's wife, it was more natural that she should continue to call them uncle and aunt than that she should adopt a new term.

2. SAME — EVIDENCE. The fact that, when such legatee, upon the death of her father, became entitled to a legacy under her grandfather's will, the testator received the legacy as her guardian and upon her arriving at age turned it over to her without accounting for the income thereof received by him, is immaterial where the legatee had been thirteen years in the testator's family, supported wholly at his expense, before she had any property whatever and, after the receipt of the legacy, the testator had presumably used the income to give such legatee greater educational advantages than he had previously felt able to afford, since a father might have done the same thing, even if it be assumed that without authority from some court it would have been unjustified.

Matter of Davis, 98 App. Div. 546, reversed.

(Argued February 27, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 15, 1904, which modified and affirmed as modified a decree of the Steuben County Surrogate's Court assessing a transfer tax upon the estate of John W. Davis, deceased.

The facts, so far as material, are stated in the opinion.

Milo M. Acker for appellants. The decedent standing in parental relation exempts this legatee from paying a collateral inheritance tax in excess of that paid by children. (L. 1896, ch. 908, § 221; *Matter of Capron*, 30 N. Y. S. R. 948.) The test of whether the testator, John W. Davis, stood in the mutually acknowledged relation of a parent to this legatee, as required by the statute, is, did each render to the other the reciprocal parental duties and filial service incident to the actual relation of parent and child? (*Matter of Spencer*, 21 N. Y. S. R. 145; *Matter of Wheeler*, 1 Misc. Rep. 450; *Matter of Capron*, 30 N. Y. S. R. 948; *Matter of Beach*, 154 N. Y. 242.) The providing and accepting of a home was of itself a mutual acknowledgment of the parental relationship required by the statute. (*Matter of Spencer*, 21 N. Y. S. R. 145; *Lyon* v. *Lyon*, 65 N. Y. 339; *Matter of Wheeler*, 1 Misc. Rep. 450.)

Newton B. Gorham for respondent. Decedent did not stand in the relation of parent to Jennie F. Lyon. (*Matter of Birdsall*, 22 Misc. Rep. 180; 43 App. Div. 624; *Matter of Deutsch*, 107 App. Div. 194; *Matter of Davis*, 98 App. Div. 546; *Matter of Capron*, 30 N. Y. S. R. 948.) The relation was not mutually acknowledged and the essence of the required relationship is that it must be mutually acknowledged to exist. (*Matter of Spencer*, 21 N. Y. S. R. 145; *Matter of Butler*, 58 Hun, 400; *Matter of Moulton*, 11 Misc. Rep. 694; *Matter of Birdsall*, 22 Misc. Rep. 180; 43 App. Div. 624; *Matter of Deutsch*, 107 App. Div. 194; *Matter of Davis*, 98 App. Div. 546.)

CULLEN, Ch. J. The sole question presented by this appeal is whether the appellant, Jennie F. Lyon, a legatee under the will of John W. Davis, sustained to that testator the relation of a "child to whom any such decedent * * * for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relation began at or before the child's fifteenth birthday and was continuous for said ten years thereafter." If she did sustain such relation, her legacy was taxable only at the rate of one per cent on the excess above ten thousand dollars; if not, the legacy was subject to a tax of five per cent. The surrogate decided in the appellant's favor. The Appellate Division has reversed that decision.

As the order of the Appellate Division is silent as to the grounds on which it was made it must, under section 1338 of the Code of Civil Procedure, be presumed that the decree of the surrogate was reversed on questions of law only, and if there was any evidence to sustain the finding of the surrogate in favor of the appellant the order of the Appellate Division was erroneous. (*Matter of Keefe*, 164 N. Y. 352.) We think the evidence was ample to justify the finding of the surrogate. The facts, tersely stated, are as follows: The appellant was a niece of the testator's wife and was born on January 31st, 1866. Her mother died November 12th, 1872, whereupon her aunt, Mrs. Davis, took the appellant from her father's home to her own, where the appellant continued to live as a member of the testator's family till his death on January 11th, 1903, a period of over thirty years. During her infancy the appellant was supported and maintained at the expense of the testator and was subject exclusively to his control and that of his wife, the father in no respect contributing to the appellant's support nor exercising any direction over her. On her father's death in 1885 the appellant became entitled under the provisions of her grandfather's will to the sum of one thousand dollars and fifty shares of Wells, Fargo Company stock. The testator Davis received this legacy as guardian of the appellant, and upon her arriv-

ing at age turned the legacy over to her without, however, accounting for the income received by him. After the receipt of the legacy the testator sent the appellant to boarding school in Albany for two years. The appellant was married from the testator's house and after her marriage continued to reside with him. Her aunt, the testator's wife, died nine years before the testator, and from that time the appellant took charge of the household matters. The appellant addressed the testator and his wife as uncle and aunt. They called her "niece," and she is so designated in the testator's will.

Upon the enactment of the statute relative to taxable transfers in 1892 (Chap. 399) there arose considerable conflict in the decisions of the lower courts as to what was necessary under the provisions of the statute to constitute "the mutually acknowledged relation of parent." In some courts it was held that this provision comprehended only the case of illegitimate children. The proper construction of the statute was settled by this court in *Matter of Beach* (154 N. Y. 242) where Chief Judge ANDREWS, writing the unanimous decision of the court, said: "The clause, we think, was intended to have a broader scope; to include, among others, those cases, not infrequent, where a person without offspring, needing the care and affection of some one willing to assume the position of a child, takes, without formal adoption, a friend or relative into his household, standing to such person *in loco parentis*, or as a parent, and receives in return filial affection and service." In that case the legatee who had been denied the reduced rate of taxation by the lower court was a married lady of middle age living with her husband. They had resided for the statutory period with the testator in his house, and the legatee had managed the household affairs of the testator. The evidence to support the legatee's claim of exemption was found in very brief affidavits, in which it was averred that the testator had stated that the legatee was his adopted daughter, and also his promise that he would treat her as a daughter. It does not appear in what terms the legatee and testator addressed one another. On these facts this

court, reversing the courts below, held that there existed between the parties the "mutually acknowledged relation of parent." After the decision in the *Beach* case the legislature amended this section of the statute by inserting the qualification now found, "provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter." (Chap. 88, Laws 1898.) This amendment was intended to exclude persons from the benefit of the section unless the relationship was formed in the tender years of the legatee, but except as thus modified the decision in the *Beach* case remains in full force. We think it would be difficult to find a stronger case of a person taking "without formal adoption a friend or relative into his household standing to such person *in loco parentis* or as a parent, and receives in return filial affection and service" than is presented by the case at bar. It is objected that the appellant did not address her uncle and aunt as father and mother, nor they call her daughter. This is of but slight importance. To give effect to it would be to sacrifice conduct and acts to appellations which are often the result of accident. Had the appellant been an entire stranger both in blood and affinity it is probable that she would have called the testator and his wife father and mother, but still other terms denoting affection might have been used. Being, however, the niece of the parties (of the testator by marriage), it was more natural that she should continue to call them uncle and aunt than that she should adopt a new term. It is also objected that the testator did not account to the appellant for the income received by him on her legacy before it was paid over to her. It is urged that this shows that he assumed to set off the expense of her support against such income. This also, under the circumstances, is of no force. The appellant had been thirteen years in the testator's family supported wholly at his expense before she had any property whatever, and ten years before her grandfather's death, when it became certain that she was to receive any property in the future. While it is true that, strictly speaking, as the father of the appellant, the testator would have been bound to support her

entirely at his own expense, it was natural that after the legacy had become payable to her the testator should think it wise to apply that income to give the appellant greater educational advantages than hitherto he had felt himself able to afford. A father might have done the same, even if we assume that without authority from some court it would have been unjustified.

The order of the Appellate Division should be reversed and the decree of the surrogate of Steuben county affirmed, with costs in both courts.

O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur; HISCOCK, J., not sitting.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN H. NIEBUHR, Appellant, *v.* WILLIAM MCADOO, as Police Commissioner of the City of New York, Respondent.

WITNESS — FAILURE TO ADMINISTER OATH TO A WITNESS IN PROCEEDING TO REMOVE POLICEMAN — WAIVER THEREOF. The inadvertent omission of a deputy police commissioner of the city of New York to administer an oath to a witness, who testified against a patrolman upon one of three charges against him which were then being heard by the commissioner, such witness having been actually sworn and having testified as to one of the other charges, does not invalidate the proceedings where the patrolman, who must have known of the omission, made no objection and cross-examined the witness; since such patrolman, by omitting in any manner to object, consented that the testimony of such witness might be considered by the commissioner without any further sanction than such as might arise from the fact that he had already been sworn to tell the truth upon one of the two other charges which were tried at the same time.

People ex rel. Niebuhr v. *McAdoo*, 107 App. Div. 615, affirmed.

(Argued March 2, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 22, 1905, dismissing a writ of certiorari and confirming the

determination of the defendant in dismissing the relator from the police force of the city of New York.

The facts, so far as material, are stated in the opinion.

Louis O. Van Doren and *Leonard A. Snitkin* for appellant. The deputy commissioner erroneously took the evidence of one Louis A. Smith, a witness against the relator, without swearing the witness on this charge. (*People ex rel. Kasschau* v. *Police Board*, 155 N. Y. 40; *People ex rel. Somerville* v. *Roosevelt*, 156 N. Y. 692; *People ex rel. Grogan* v. *York*, 166 N. Y. 582; *People ex rel. Hart* v. *York*, 169 N. Y. 452; *People ex rel. Shiels* v. *Green*, 179 N. Y. 195.)

John J. Delany, *Corporation Counsel* (*Theodore Connoly* and *Royal E. T. Riggs* of counsel), for respondent. The three charges against relator were tried as one continuous proceeding, and it was not necessary to re-swear the witnesses Ryan and Smith on the third charge when they had already been sworn on the first charge. (*People ex rel. Ballard* v. *Moss*, 34 App. Div. 475; *People ex rel. Kasschau* v. *Police Board*, 155 N. Y. 40.)

WILLARD BARTLETT, J. The only point which we deem it necessary to discuss on this appeal arises out of the inadvertent omission of the deputy police commissioner to administer the oath to one of the witnesses who testified against the relator. According to the original return this witness, where his name first appears in the record, is mentioned as being "re-called." By the additional affidavits, however, which serve the purpose of a supplemental return, it is made sufficiently clear that three charges against the relator were intermingled in the hearing conducted by the deputy police commissioner; that the witness in question had been actually sworn as to one of these charges, but that there was an omission to swear him again when he was re-called to testify in regard to the particular charge which was the basis of this proceeding. The relator, who was present, made no objection to the reception of the testimony of the witness; but it is, nevertheless, argued

that its admission is fatal to the determination, inasmuch as the relator's failure to object did not constitute a waiver, under the authority of *People ex rel. Kasschau* v. *Board Police Comrs. N. Y.* (155 N. Y. 40).

The facts of that case were very different. It involved much more than the mere omission, by inadvertence or mistake, to administer the oath to a single witness out of a large number of persons called to the stand. There was an intentional failure to swear any of the witnesses, the manifest idea of the acting police commissioner being that he possessed the power and right to remove the officer upon wholly unverified statements, and those alone. The departure, not only from the form, but from the substance of judicial procedure, in the *Kasschau* case was so glaring and willful, the removal of the relator therein being without the support of a shred of sworn evidence, that the silence of the accused officer, under the exceptional circumstances there presented, was not deemed to be a waiver.

Here, however, we have no purpose on the part of the deputy commissioner to dispense with the oath, but evidently an assumption on his part that an oath administered to a witness upon being called to testify in respect to one of the three charges intermingled in the investigation sufficed to qualify the witness to speak in reference to another charge in regard to which he was not specifically sworn. The relator appears to have joined in this assumption. He cross-examined the witness without an intimation of any objection, although he must have known all that the deputy commissioner knew about the omission to swear him specifically as to this charge. We think a waiver may fairly be implied under the authorities.

In *Lawrence* v. *Houghton* (5 Johns. 129) the question was whether a former judgment in a Justice's Court was a bar. Upon the trial the justice, who had tried the former suit, stated to the jury that there was a former suit between the parties, the nature of it and the judgment. Upon appeal it was held: "The statement of the justice was not competent evidence of itself, but could be made so by consent of the

parties, and that consent was to be inferred from the omission of the plaintiff to object to it when it was offered and given. *Qui tacit consentire videtur.*"

In *Cady* v. *Norton* (14 Pick. 236) a motion was made by the defendant to set aside the verdict on the ground that one of the witnesses who had testified to material facts on the part of the plaintiffs was not sworn. The defendant and his counsel became aware of this fact before the case went to the jury while his counsel was summing up, at which time the witness had left town for his home ten or twelve miles distant. The attention of the court was not called to the matter, nor was any exception taken, and it was held on review by SHAW, Ch. J., that the objection was not available after verdict. The exception insisted on was said to be obviously one of the kind which a party has the right to waive, it being competent to parties and not uncommon in practice by consent to receive the statement of a person as evidence who is not sworn.

"If a party admits proof to be taken in a cause without an oath after it has been acted upon and made the basis of a judgment, he cannot object to the admissibility." (*Nesbitt* v. *Dallam*, head note, 7 Gill & Johns. [Md.] 494.)

In *Slauter* v. *Whitelock* (12 Ind. 338) one of the grounds of the attack on a verdict for the plaintiff was that one of the witnesses had not been sworn. "We are not informed," says the court, "when the mistake as to the testimony having been without the sanction of an oath was discovered by the complaining party. The first we hear of it is in the reasons for a new trial. If it was known before the jury retired, the mistake could have been corrected by swearing the witness and rehearing the evidence, or if that course was not taken, by an instruction to the jury to disregard his statements. If no motion was made upon the discovery, by either party, it would amount to acquiescence in the reception of his statements as evidence in the case."

The case of *Hawks* v. *Baker* (6 Me. 72) was one in which an unsworn witness testified, believing that he had been sworn, and in which the omission to administer the oath

was unknown to the parties or their counsel until after the verdict. Here, of course, there was no room for the application of the doctrine of waiver, and the verdict was set aside; but the court in granting a new trial, distinctly recognized the fact that a party might by implication consent to the reception of testimony by a witness who had not been sworn, saying: "It is a well settled principle of law that no evidence can be permitted to go to the jury, unless under oath, *without express or implied consent.*"

It seems to us that it is not too much to say in the case at bar that the relator, by omitting in any manner to object, consented that the testimony of the witness Louis A. Smith might be considered by the deputy police commissioner without any further sanction than such as might arise from the fact that he had already been sworn to tell the truth upon one of the two other charges which were tried, in part at least, at the same time.

The order of the Appellate Division should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ., concur.

Order affirmed.

M. & E. SOLOMON TOBACCO COMPANY, Appellant, *v.* BENJAMIN F. COHEN et al., as Surviving Members of the Firm of SIMON AUERBACH & Co., Respondents.

SALES — CONTRACT FOR SALE OF GOODS IN BOND — WHEN VENDEE ENTITLED TO DUTY REFUNDED THEREON. Where, in a memorandum of sale of imported tobacco, stored in a bonded warehouse, on which the duty had not been fixed, the price named was a certain sum per pound, including the duty thereon, which was estimated at seventy cents per pound, but "if appraised at less," the difference in duty to be allowed vendee, the tobacco to be taken and paid for within five months, and the vendee took and paid for the tobacco within the time named, and in addition thereto also paid the vendors sixty-one cents per pound for the duty as fixed by the collector, the vendors paying over such duty to him, under protest, and thereafter such proceedings were instituted by them that the protest was sustained and the duty reduced to thirty-five cents per pound, the collector refunding to them the excess of duty, out of which

they paid fifty per cent for the services of their attorney, leaving the remainder in the hands of the vendors, who refused to pay it over to the vendee upon its demand, held that the vendee was entitled to a judgment against the vendors for such balance; since the rights of the parties depend on the meaning of the expression "if appraised at less," which means a lawful appraisal, whether made by the collector or adjudged by the court; it means such an appraisal as the law required and justified, not such as was made by the collector, which was illegal and was treated by the government as illegal. In effect, the sale was subject to the payment of the duty by the vendee, but the vendors were to pay it for the vendee out of moneys furnished for the purpose, so that the vendors must be deemed to have received the refunded duty for the benefit of the vendee who is entitled to it, therefore, less the expenses of collecting it.

Solomon Tobacco Co. v. *Cohen*, 95 App. Div. 297, reversed.

(Argued February 14, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 17, 1904, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury and granting a new trial.

The trial court found that on the 10th of June, 1890, the defendants sold to the plaintiff 37 bales of Sumatra tobacco at $2.25 a pound, including estimated duty, pursuant to a written contract made for and in behalf of the defendants by their duly authorized brokers, of which the following is a copy:

"NEW YORK, *June* 10/90.

"Sold to M. & E. Solomon Tob. Co.

"For account of S. Auerbach & Co.

"Terms: Duty cash 70c. If appraised at less diffce. to be allowed $5,000. 4 & 5 mos. — Balance less discount for unexpired time. All to be taken in five months.

"37 bales Deli. NY-K SLI.

"Examined and accepted at $2.25.

"MAURICE ELLER & SON,

"*Brokers.*"

The tobacco, recently imported, was in a bonded warehouse, and the duty thereon had not been fixed, for there had been no appraisal. The sum of 70 cents a pound was arbitrarily agreed upon by the parties at the time of the sale as the

probable maximum of duty upon said tobacco, and, as the trial judge found, "It was expressly agreed in the aforesaid contract that if the tobacco should be dutiable at a less sum the difference should be allowed to the plaintiff."

Shortly after the contract was made the tobacco was appraised and the duty collected at the rate of 61 cents per pound, which was fixed by an erroneous and unlawful method of classification. The difference of 9 cents between the estimated rate stated in the contract and that fixed by the collector of the port of New York was allowed to the plaintiff, which, between June 16th and December 1st, 1890, paid the defendants for the tobacco substantially in accordance with the terms of the contract. The plaintiff, between said dates, upon withdrawing the tobacco from bond in installments, paid the defendants on each occasion the sum of 61 cents per pound as and for the duty fixed by the collector, said payments amounting in the aggregate to $3,832.63. Upon receiving said amount of duty from the plaintiff the defendants paid the same to the collector, who thereupon released the tobacco, which was delivered to the plaintiff. All of said duty was paid by the defendants to the collector under the protest that said tobacco was not lawfully dutiable at the rate of 61 cents per pound, and that said rate had been fixed by an erroneous and unlawful method of classification. Thereafter such proceedings were had that said protest was sustained, the duty upon the tobacco was reduced, and on December 30th, 1899, the collector refunded to the defendants, of the duty so paid as aforesaid, the sum of $1,311.50, of which they paid 50 per cent to their attorney for the collection thereof. The trial court found that on the 30th of December, 1899, the defendants had received to the plaintiff's use the sum of $655.75, which they refused on due demand to pay to the plaintiff. No material fact was found except as thus stated. Judgment was ordered in favor of the plaintiff for the sum of $655.75, with interest thereon from the date of demand. Upon appeal to the Appellate Division the judgment was reversed and the plaintiff appealed to this court.

Louis Marshall and *Abraham Benedict* for appellant. The construction of the contract adopted by the trial court is the only admissible construction, and the Appellate Division erred in reversing the judgment. (Benjamin on Sales, §§ 295–302; 1 Pars. on Cont. [7th ed.] 585; *Smith* v. *Kerr*, 108 N. Y. 31, 37; *Wells* v. *Alexandre*, 130 N. Y. 642; *H. C. & C. Co.* v. *E. C. & C. Co.*, 113 Fed. Rep. 256; *Matter of Blumlein*, 55 Fed. Rep. 383; 2 Pars. on Cont. [7th ed.] 292; *Woodruff* v. *Woodruff*, 52 N. Y. 53.)

B. F. Einstein for respondents. The plaintiff's claim must be determined solely upon the contract under which the tobacco was sold. (*Woolsey* v. *Funke*, 121 N. Y. 87; *Nicoll* v. *Sands*, 131 N. Y. 24; *Woodruff* v. *Woodruff*, 52 N. Y. 53; *Hepburn* v. *Griswold*, 8 Wall. 604; *Parker* v. *Davis*, 12 Wall. 457; *Wadsworth* v. *Green*, 1 Sandf. 78; *Moore* v. *Des Arts*, 1 N. Y. 359.) The equities of this case are entirely with the defendants. (*Seeberger* v. *Castro*, 153 U. S. 32.) There can be no recovery for money had and received. (*Butterworth* v. *Gould*, 41 N. Y. 450.)

VANN, J. The question presented for decision is what did the parties mean by their brief memorandum in view of all the circumstances surrounding them when they made it? The question is close, for the courts below divided in judgment upon it and we are compelled to decide by the vote of a majority. The parties might well have been more explicit in their contract and not have left to implication that which could have been expressly stated by the use of one or two additional words. It is not for us, however, to criticise but to decide, and in announcing our decision in favor of the plaintiff we state the following as, in brief, the grounds of our judgment.

It would naturally be expected that the plaintiff, who furnished the money to pay the duty, would be entitled to any overpayment exacted by the agents of the government, rather than the defendants, who, although making the pay-

ment, in fact did not use their own money for the purpose. No one was really interested in the amount paid except the plaintiff, upon whom the burden of the duty fell, although the defendants formally handed the money over because the government would accept it only from the importer. While the sale was for the nominal sum of $2.25 per pound, the real purchase price was that sum less the estimated duty of 70 cents to be advanced by the plaintiff in cash for the sole purpose of paying the duty. It was expressly conceded at the trial that the "seventy cents entered into the price of $2.25," and that "$2.25 per pound means the price of the tobacco per pound including the seventy cents duty." The sum of seventy cents, however, having been arbitrarily agreed upon merely for convenience, was by the terms of the contract subject to reduction either exclusively on the basis of the appraisal made by the collector, or by the final and only legal appraisal which was made in effect through an adjudication by the Federal courts. The rights of the parties depend on the meaning of the expression "if appraised at less," which, as we read it, means a lawful appraisal, whether made by the collector or adjudged by the court. It means such an appraisal as the law required and justified, not such as was made by the collector, which was illegal and has been treated by the government as illegal. Since the plaintiff advanced the duty as estimated simply for the protection of the defendants, the word "appraised" should not be limited to the unlawful action of the collector, but should be extended to the method, whatever it was, by which the lawful duty was ascertained. It is obvious that the real price of the tobacco was $1.55 per pound, plus the lawful duty to be ascertained by an appraisal, but the plaintiff was to advance enough to protect the defendants who were liable to the government as they had imported the tobacco. Such advance was made simply to indemnify the defendants against loss and any balance left after payment of the actual duty was to be restored. Thus the sale in effect was subject to the payment of the duty by the plaintiff, but the defendants were to pay it for them out of moneys furnished for the purpose.

The appraisal by the collector was at sixty-one cents and the difference between that sum and seventy cents, the amount advanced to pay the duty, has been restored, but the difference between the duty called for by the collector's appraisal and thirty-five cents, the rate fixed by the courts, although paid back by the government to the defendants, has not been paid by them to the plaintiff.

The time fixed for the performance of the contract does not control, as the defendants were not to pay the duty with their own money. There was no postponement of performance of any part of the contract in which the defendants had a pecuniary interest. They were to get their pay within the time fixed for performance in any event, and what interest had they beyond that? The lawful appraisal might have been made within the five months provided for payment of the purchase price to the defendants, and even if it was not made within that period of what concern was it to them, as they had all they were entitled to? The fact that the mistake of the collector was not acknowledged for a long time gave them no title to the money. The delay in the final appraisal caused them neither loss nor inconvenience. The risk was not theirs, but the plaintiff's, who performed within the time allotted and thereupon the real interest of the defendants ended. While it was not their legal duty to take steps for a further and lawful appraisement, it was a matter of fairness to their customers, because they had been paid for what they sold and they might well take such voluntary action as the interests of their customers required. They were not compelled to act, but having acted, the result was not for their own benefit but for the benefit of the one who furnished the money to them to pay the duty. They commenced no action to recover the money back, but entered a protest when it was paid, employed an attorney apparently upon a contingent fee, probably appealed to the secretary of the treasury within the time required by statute, and then let the matter rest until the lawful rate was determined in an action brought by other importers. (*In re Blumlein*, 49 Fed.

Rep. 228; 55 Fed. Rep. 383.) The plaintiff could not protest, as it had no relations with the government, and the defendants by protesting showed that they thought the collector's appraisal was unlawful. After the lawful rate had been fixed by the court, the custom house officers, as one of them testified, "went back over their (our) figures and appraisements made on the former basis and corrected them to conform to the decision. * * * The real adjustment resulted in a refund to the importer and was upon the basis of the examination of the samples of the tobacco originally made." The plaintiff provided the money and ran the only risk and it was within the reasonable contemplation of the parties that it should receive the amount refunded by the government, after payment of expenses. *Ex æquo et bono* the defendants had no right to it, but simply received it to the use of the plaintiff.

In a "bought" memorandum drawn by a broker the essentials are expressly stated and the rest left to reasonable implication from what is thus stated, when considered in the light of the situation of the parties and the circumstances known to both.

The test is what would a reasonable man infer on reading the contract in the light of that situation and those circumstances if the facts ultimately developed occurred to him as possible or likely to happen.

The defendants are to be commended for their efforts to protect their customers, and they have been paid their expenses in so doing. It was not their money they were looking after but the money of the plaintiff. Unless they contracted with reference to the lawful duty they are in the attitude of speculators at the expense of their patrons. Good faith and fair dealing require a construction that will give effect to the contract as a reasonable man would understand it at the time it was made, and this we have endeavored to do.

We find no error of law committed by the trial judge, and as the judgment rendered by him was not reversed on the facts, but on the law only, we think the order of the Appel-

late Division should be reversed and the judgment of the trial court affirmed, with costs in Appellate Division and in this court.

CULLEN, Ch. J., EDWARD T. BARTLETT and WILLARD BARTLETT, JJ., concur; GRAY, HAIGHT and CHASE, JJ., dissent on opinion of Appellate Division below.

Ordered accordingly.

CLARENCE T. BIRKETT, Appellant, *v.* JAMES E. NICHOLS et al., Respondents.

CONTRACT OF SALE — WAIVER. Where by the terms of a contract for the sale of ten carloads of flour the vendor agreed to ship the same during the month of November, but in fact shipped but three carloads during that month, six carloads of the remainder being shipped during December and one in January, in an action by the vendor to recover damages caused by the refusal of the vendees to accept the December and January shipments, evidence that during the latter part of November the agent of the vendees in a conversation with the agent of the vendor requested that the latter write to his principal and ascertain "if it would suit him just as well to have that flour distributed through December as to have it all come the latter part of the month," and upon the vendor's agent consenting to so write, further said, "string it along through December," and that during a subsequent conversation between them the vendees' agent asked if the vendor had been written to with reference to distributing their December flour, to which the vendor's agent replied that he thought they had written, together with evidence that the shipments were actually strung along through December as suggested, that an invoice was sent to the vendees as each car was shipped, sight drafts drawn upon them for the purchase price and they were informed of the arrival of the cars at their destination, is sufficient to support a finding that as to the December shipments the provision of the contract requiring delivery in November had been waived, where, so far as appears, the invoices were retained by the vendees without objection and no intention of rejecting the goods was manifested by them until the middle of January.

Birkett v. *Nichols*, 98 App. Div. 631, reversed.

(Argued February 14, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 15, 1904, reversing a judgment in favor of plain-

tiff entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

S. F. Lincoln and *Calvin J. Huson* for appellant. The proof in this case warrants the finding that there was an express waiver on the part of the defendants at the time of performance, and also that there was a waiver of the time of performance wholly independent of the express agreement to that effect. (*Thorne* v. *French*, 4 Misc. Rep. 436; *Smith* v. *Gugerty*, 4 Barb. 614; *Wood* v. *Perry*, 1 Barb. 114; *Thompson* v. *Poor*, 147 N. Y. 402.)

Henry D. Hotchkiss for respondents. The finding that the original contract was at any time or in any way modified was without any evidence to support it. (*Nat. H. Co.* v. *Bement*, 163 N. Y. 505; *Matter of Keefe*, 164 N. Y. 352; *Shotwell* v. *Dixon*, 163 N. Y. 43.) The defendants did not by delay waive their right to reject the December shipments. (*Kien* v. *Tupper*, 52 N. Y. 550; *Chapin* v. *Fitzgerald*, 5 N. Y. Supp. 722; 127 N. Y. 670; *Comcl. Bank* v. *Pfeiffer*, 108 N. Y. 242; *M. Bank* v. *U. R. R. Co.*, 109 N. Y. 373; *Eppens* v. *Littlejohn*, 27 App. Div. 22; 164 N. Y. 187.)

WILLARD BARTLETT, J. It does not appear by the order or judgment of the Appellate Division that the reversal was upon questions of fact. There is no suggestion that any material error of law was committed in the rulings upon evidence, so that the only questions of law which this court is called upon to consider are (1) whether the conclusion of law is supported by the facts found, and (2) whether a finding of fact essential to sustain the judgment of the trial court is wholly without evidence to support it. (*Nat. Harrow Co.* v. *Bement & Sons*, 163 N. Y. 505.)

This litigation arises out of a contract in writing made on November 10, 1902, whereby the plaintiff agreed to sell to

the defendants and the defendants agreed to purchase from the plaintiff ten car loads of buckwheat flour to be shipped from Penn Yan, N. Y., during the month of November, 1902, and delivered in the city of New York. The plaintiff shipped three cars of flour in November, 1902, six in December, 1902, and one on January 12, 1903. As a justification for postponing the shipment of seven out of the ten cars to dates later than November, 1902, the plaintiff claimed, *first*, that prior to December 1, 1902, and while the original contract was in full force and effect, it was modified by the parties so as to provide that only three cars need be shipped in November, while the remainder might be shipped from time to time during December; and, *secondly*, that wholly independent of any such modification of the original contract in November, 1902, before any alleged breach thereof, there was a waiver by the defendants of the provisions of the contract as to the time of the delivery of the cars, so as to permit delivery at any time.

The defendants paid drafts drawn for the three cars of flour shipped in November and a draft drawn for one car shipped in December, under the supposition that it had in fact been shipped in November. About the middle of January, 1903, however, they notified the plaintiff that three cars were all that had been shipped in contract time and that the December shipments were too late and would not be accepted. The plaintiff thereupon brought this action to recover damages for the defendants' refusal to accept and pay for five car loads of flour shipped in December and the one car load shipped in January, alleging separately the modification of the original contract and (by an amendment of the complaint at the beginning of the trial) the waiver as to the time of performance, to which reference has already been made. The learned justice before whom the case was tried without a jury made the following finding in reference to such alleged modification and such alleged waiver: "III. That after the making of such contract and before the time limited for the performance thereof had expired negotiations were had

between the plaintiff and defendants for an extension of the time for the delivery of such flour, and the time for such delivery was extended, and the provision of said contract requiring delivery in the month of November was waived by the defendants, and permission given by said defendants to string the delivery of said cars not shipped in the month of November along through the month of December." The learned trial judge also found, as matter of fact, that the plaintiff suffered a loss of $300.72 on each of the six cars which the defendants refused to accept, and as a conclusion of law that the defendants were liable in that amount for each of the five cars shipped in December (allowing nothing for their refusal to accept the car shipped in January). Accordingly he directed the judgment in favor of the plaintiff which has been reversed by the Appellate Division.

In the prevailing opinion below the reversal is placed mainly on the ground that there is no evidence to sustain the finding that *before* the expiration of the time fixed for the delivery of the flour the contract was modified in respect to the time of delivery. As to the other claim of the plaintiff, that there was a waiver of the time limitation, irrespective of the alleged modification before default, it was held that the judgment of the trial court had proceeded upon an entirely different theory and that upon the appeal then before the court the plaintiff was "limited to the conclusion reached by the trial justice that the time of delivery was extended *before* it expired."

We are unable to concur in this view as to the scope of the finding in question. We construe it to be both a finding of a modification before breach and a finding of a waiver, and assuming that the learned Appellate Division was right in holding that there was no evidence to uphold the finding as to the alleged modification, we cannot say that the finding of a waiver was without evidence to support it. If thus supported it affords an adequate basis for the conclusion of law that the plaintiff was entitled to recover, and the reversal cannot be sustained.

The negotiations in the city of New York were carried on between Haymen & Bowlin, a firm of brokers representing the plaintiff, and Albert Brandley, the flour buyer for the defendants' firm, Austin, Nichols & Co. According to the testimony of Lorenzo D. Bowlin, one of the plaintiff's brokers, he had a conversation with Mr. Brandley in the latter part of November, 1902, which he narrates as follows:

"He says to me, 'Mr. Bowlin, I wish you would write Mr. Birkett and ask him if it would suit him just as well to have that flour distributed through December as to have it all come the latter part of this month.' I said, 'I will do that, Mr. Brandley.' That was just a few days before the last of the month. He said, 'String it along through December.' That was the expression he used. I had a conversation with him on the subject after that date. Either the last of November or the first of December I had a conversation with him on the subject of the delivery of this flour at that time. Mr. Brandley asked me if I had written Birkett with reference to distributing their December flour, and I told him that I thought we had written Mr. Birkett. That was about the only conversation with reference to the shipment of it."

Here we have not only the evidence of a consent that deliveries thereafter to be made might be made in December instead of November, but evidence of an express request on the part of the purchasers of the flour that the future shipments should be thus postponed. It is true that this consent does not appear to have been communicated by the broker to the plaintiff until December 1, 1902; but the plaintiff had learned of it as early as the 2nd, for under that date he wrote to the broker expressing his satisfaction that he could get a little extra time on the delivery of Austin, Nichols & Co.'s order; and he did in fact "string" the subsequent deliveries along through December, precisely as the defendants had desired, the court having found that the shipments were made on the 5th, 13th, 19th, 24th, 27th and 29th days of that month. As each car was shipped the plaintiff sent an invoice thereof to the defendants and drew sight drafts for the purchase

price of each shipment. The defendants were also informed of the arrival of the cars at New York. The invoices were retained without objection, so far as appears, and the defendants manifested no intention of rejecting any of the goods until about the middle of January, 1903, when they notified the plaintiff, for the first time, that the December shipments would not be accepted.

We think that the oral consent given by the agent of the defendants to the agents of the plaintiff in the latter part of November, 1902, that the shipments of flour yet to be made under the written contract could be made in December, 1902, together with the evidence as to the shipments actually made in December, and the conduct of the defendants in reference thereto, authorized the inference of a waiver completely executed. (See *Thomson* v. *Poor*, 147 N. Y. 402.)

The order of the Appellate Division should be reversed and the judgment of the Trial Term affirmed, with costs.

GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur; CULLEN, Ch. J., absent.

Ordered accordingly.

JACOB DURR, Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

NEGLIGENCE — DEFECTIVE WALK AT RAILROAD CROSSING — QUESTION OF FACT. Where it appears, in an action brought against a railroad company to recover for injuries resulting from a fall caused by a defective walk over a railroad at a street crossing, that the railroad tracks had been raised at the crossing, planks being placed on either side of each rail, the space between the planks being filled with broken stone and gravel which had settled so that, at the time of the accident and for several weeks prior thereto, there was in the line of the walk and on the outside of the plank along one side of a rail an oblong hole or depression several inches deep, sloping up from its deepest point at the edge of the plank toward the center of the space between the rails; that at the time of the accident, about half-past ten in the evening, plaintiff was walking slowly across the tracks at the point in question at which no light was maintained by the railroad company, the nearest city light being about

one hundred and seventy-five feet distant, when he stepped into such hole or depression, catching his foot under the edge of the plank and fell, seriously fracturing his ankle and leg, it is erroneous to dismiss the complaint, since such hole or depression was such a defect that the question whether the defendant was guilty of negligence in permitting the same to remain in the crossing should have been submitted to the jury.

Durr v. *N. Y. C. & H. R. R. R. Co.*, 97 App. Div. 643, reversed.

(Argued March 13, 1906; decided March 20, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 9, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

D. F. Searle for appellant. The defendant was negligent in not keeping the crossing safe. (*Allen* v. *B., R. & P. R. R. Co.*, 151 N. Y. 434; *McKinney* v. *N. Y. C. & H. R. R. R. Co.*, 66 App. Div. 207, 209; *Gale* v. *N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 594; *Lowell* v. *C. V. R. R. Co.*, 15 App. Div. 218; *Worster* v. *F. S. S. R. R. Co.*, 50 N. Y. 203; *Casper* v. *D. D. R. R. Co.*, 23 App. Div. 458; *Cuddeback* v. *Jewett*, 20 Hun, 187; *Payne* v. *T. & B. R. R. Co.*, 83 N. Y. 572; *Wasmer* v. *D., L. & W. R. R. Co.*, 80 N. Y. 212.)

Charles T. Titus for respondent. The nonsuit was proper. The condition complained of was not such as to constitute negligence on the part of the defendant. (*Beltz* v. *City of Yonkers*, 148 N. Y. 67; *Bateman* v. *N. Y. C. & H. R. R. Co.*, 47 Hun, 429.)

CHASE, J. The plaintiff fell while walking on a street in the city of Rome, at a place where such street is crossed by the tracks of the defendant's railroad. This action is brought to recover damages for personal injuries received by such fall. At the crossing there are four sets of railroad tracks numbered

one, two, three and four from the south. The sidewalk, as it approaches the crossing, is surfaced with gravel. The defendant, a few months previous to the accident, had raised its tracks and on each side of each rail it had placed plank level with the top of the rails. Between the plank, and also approaching the outside tracks, defendant filled the roadway and sidewalk with broken stone and gravel. The gravel settled, so that on the day of the accident and for several weeks prior thereto there was in the line of the sidewalk on the north side of the rails of the third track more or less depression, and at one point next to the plank and from three to five feet from the east line of the sidewalk there was a depression or hole four to six inches in depth and about eighteen inches wide along the plank and extending north from the plank about ten to twelve inches. This hole or depression was deepest in the center and next to the plank, and the gravel sloped to such center from the north and from each side. The full edge of the plank, and a space under the plank, was visible for about six inches. The plaintiff, who was a heavy man of middle age, was going south on said street about half-past ten in the evening on a dark, rainy night, and continued in the line of the sidewalk to cross said tracks, when he stepped into said depression and fell. There were no lights maintained at said crossing, and the city light on the south was 175 feet away, and that on the north was beyond an intervening canal bridge. The plaintiff described the occurrence as follows: "I was walking very slowly down on to the tracks, but when I got on the railroad, as was natural, I took a little faster gait to walk to get across the railroad, and then, the first thing I knew, down went my foot into a hole and got caught; my toes got caught and I couldn't help but fall; it was my right foot that caught." Plaintiff suffered what is commonly known as a "Pott's fracture" of the right ankle, and also a break of the large bone of the leg about eight inches above the Pott's fracture. On the trial, at the close of the plaintiff's evidence, the court stated, in substance, that the evidence relating to the plaintiff's contributory negligence presented a question of fact to be determined by

the jury, but that the defect in the walk was not such as to raise a question of fact as to the defendant's negligence, and the defendant's motion for a nonsuit was thereupon granted.

The right of a wayfarer to assume, in the absence of lights or any warning, that a public highway or walk is normal and safe has been very recently re-asserted by this court in *Mullins* v. *Siegel-Cooper Co.* (183 N. Y. 129).

It is provided by section 11 of the Railroad Law (Chap. 565, Laws 1890): "Every railroad corporation which shall build its road along, across or upon any * * * street, highway, * * * which the route of its road shall intersect or touch, shall restore the * * * street, highway * * * thus intersected or touched, to its former state, or to such state as not to have unnecessarily impaired its usefulness * * *."

It is the duty of a railroad corporation, both under the statute and upon common-law principles, to keep its road at a crossing in safe condition, so that a traveler upon the highway, exercising ordinary care, can pass over the same in safety. (*Gale* v. *N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 594; *Masterson* v. *N. Y. C. & H. R. R. R. Co.*, 84 N. Y. 250.)

If, for instance, the railroad should find it necessary to re-lay its track on a different grade at a crossing, the statute would require it to make such repairs or changes in the highway as to conform to the new situation. (*Allen* v. *Buffalo, R. & P. R. Co.*, 151 N. Y. 434.)

The care required is dependent in every instance upon the location of the highway, the extent of the travel thereon, and upon all the circumstances surrounding and affecting the particular situation. As is said in *Bateman* v. *N. Y. C. & H. R. R. R. Co.* (47 Hun, 429): "It is reasonable care and diligence measured by the circumstances of each case."

This crossing was at a city street. There was a hotel on the east side of the street immediately south of the tracks. The Erie canal was near the west side of the street, but the east side thereof seems to have been fully covered with build-

ings. The crossing is one of such importance that gates were there maintained and a flagman was there stationed by the defendant both night and day, although at the time of the accident the gates were up and the flagman was not in sight. One or more slight accidents had occurred by reason of the same depression prior to the accident to the plaintiff.

The decisions in cases where it has been held that certain depressions in the surface of a street or walk are not sufficient to present a question for the determination of a jury as to the negligence of a municipality do not aid us materially in determining the question now before us.

The form and limited north and south extent of the depression as described in this case was such that if a person walking toward the south should step into it his foot would naturally slide forward so that the toe of his shoe would extend under the plank, and if the foot was thus caught, even for a moment, a fall to the ground and an injury to the person's foot or leg should reasonably be anticipated.

The two cases in this court upon which the defendant relies are *Beltz* v. *City of Yonkers* (148 N. Y. 67) and *Hamilton* v. *City of Buffalo* (173 N. Y. 72). In each of these cases the decision rests wholly upon the determination that the defect was slight and that danger was not reasonably to be anticipated, and that according to common experience an injury to a pedestrian was not likely to happen.

It is only when the defect is so slight that no careful or prudent man would reasonably anticipate any danger from its existence, and when it could only have been guarded against by the exercise of extraordinary care and foresight, that the question of responsibility therefor is one of law. (*Beltz* v. *City of Yonkers*, *supra*.) If the question of defendant's negligence depends upon conflicting inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men it must be submitted to a jury. (*Payne* v. *Troy & Boston R. R. Co.*, 83 N. Y. 572.) The danger from the defect described in this case was more apparent than from the alleged defects described in the *Beltz*

and *Hamilton* cases, and it was such a defect that the question of the defendant's negligence in permitting the same to remain in the crossing should have been submitted to the jury. (*Mullins* v. *Siegel-Cooper Co.*, *supra.*)

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ., concur; GRAY, J., not sitting.

Judgment reversed, etc.

LOUIS ROSENSTEIN, Respondent, *v.* HENRY VOGEMANN et al., Appellants.

1. CHARTER PARTY — WHEN CHARTERERS, NOT OWNERS, ARE LIABLE FOR LOSS OF GOODS RESULTING FROM ALLEGED NEGLIGENCE IN UNLOADING GOODS. Where a charter party gives to the charterers of a steamship the absolute right of selecting the dock, wharf or place for the discharge of the cargo with which the steamship is laden, provided only that the steamer shall always lie safely afloat at any tide, the charterers to indemnify the owner from all consequences or liabilities that might arise from the signing of bills of lading, the owner is not liable for the value of goods destroyed by the collapse of a pier as the result of the alleged negligence of the charterers in failing to exercise reasonable care and diligence in selecting a suitable place in which to unload and deposit the goods.

2. COMMON-LAW RULE AS TO NOTICE TO CONSIGNEE — WHEN IT IS NOT AVOIDED BY PROVISIONS OF BILL OF LADING. The common-law rule that where the contract is to carry goods by water from port to port, the carrier is liable until the goods have been actually delivered or notice of the time and place of arrival of the vessel given to the consignee and a reasonable time thereafter allowed for the removal of the goods, is not avoided by a provision in a bill of lading, "Goods to be taken from the ship by the consignee directly they come to hand in discharging the ship and the carrier's responsibility to cease package by package immediately the goods leave the ship's deck or tackle. If not taken from alongside by the consignee they will be landed and deposited at the expense of the consignee and at his risk of fire, loss or injury on the dock or in the warehouse or in craft," where the bill of lading is silent upon the question of notice; since in so far as the contract is ambiguous or leaves the intention of the parties in doubt, it must be construed against the carrier.

3. WHEN NOTICE TO CONSIGNEE IS INSUFFICIENT — LIABILITY OF CARRIER FOR LOSS OF GOODS CAUSED BY COLLAPSE OF PIER. Where it appears, in an action brought for the value of goods carried under such bill of lading from a foreign port to a consignee in the city of New York and destroyed by the collapse of a pier upon which they were unloaded, that they were transported by a freight steamship having no pier or dock of her own, and no schedule or fixed time of arrival, so that the consignee could not estimate or determine with reasonable certainty the day on which she would arrive or at what pier or wharf she would find a berth; that the steamship was berthed at a Staten Island pier about noon of a certain day; that the consignee received notice of that fact from the owners of the pier between two and three o'clock of the same day; that the unloading of the goods was concluded on the following day, they being placed upon the pier, and that at about five o'clock of that day the pier collapsed and the goods were precipitated into the water and thereby rendered valueless, the evidence justifies a finding that sufficient notice of the arrival of the steamship, and reasonable time to appear at the pier and take charge of the freight, was not given to the consignee, so that the carriers were not relieved, under the circumstances, of their liability as common carriers by a discharge of the goods upon the pier; and such liability is not dependent upon the question whether they were guilty of negligence in having failed to exercise reasonable care in selecting a safe place to unload.

Rosenstein v. *Vogemann*, 102 App. Div. 39, affirmed.

(Argued March 6, 1906; decided March 20, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 28, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Notman and *Wilhelmus Mynderse* for appellants. Under the provisions of the bill of lading contract, under which the goods were received and shipped, the carriers' liability, as such, ceased upon the arrival of the ship and the discharge of the cargo, package by package, immediately the goods left the ship's deck or tackle. (*Constable* v. *Nat. S. S. Co.*, 154 U. S. 51; *Dorr* v. *N. J. S. N. Co.*, 11 N. Y. 485; *Bissell* v. *N. Y. C. R. R. Co.*, 25 N. Y. 442; *Steinway* v.

E. R. R. Co., 43 N. Y. 123; *Park* v. *Preston*, 108 N. Y. 434; *Mynard* v. *S. R. R. Co.*, 71 N. Y. 180.) The carriers were in no event liable for goods discharged over the ship's side and deposited on the wharf other than as warehousemen. (*Collins* v. *Burns*, 63 N. Y. 1; *Tarbell* v. *R. E. S. Co.*, 110 N. Y. 170; *Gleadell* v. *Thompson*, 56 N. Y. 194.) The defendants were not common carriers, but simply under the charter party and bill of lading made a contract, as agents for the master, between the owner of the steamer and plaintiff's assignor, for the transportation of this shipment from Hamburg to New York. (*Freeman* v. *Buckingham*, 18 How. [U. S.] 182; *The New York*, 93 Fed. Rep. 495; *The Maggie Hammond*, 9 Wall. 435; *Robinson* v. *Chittenden*, 69 N. Y 525; *Hooe & Co.* v. *Groverman*, 1 Cranch, 214; *Reid* v. *U. S.*, 11 Wall. 591; *The Nicaragua*, 71 Fed. Rep. 723; *Fenton* v. *Dublin Steam Packet*, 8 A. & E. 835; *Manchester* v. *Furness, Withy & Co.*, L. R. [2 Q. B. 1895] 282; *The Sprott*, 70 Fed. Rep. 327.)

H. Aplington and *Charles R. Barge* for respondent. The defendants' liability as common carriers continued until after the arrival of the vessel and a reasonable time for the consignees to remove the goods. (*McAndrews* v. *Whitlock*, 52 N. Y. 40; *Tarbell* v. *R. E. S. Co.*, 110 N. Y. 170; *Brand* v. *N. J. S. Co.*, 10 Misc. Rep. 128; *McKinney* v. *Jewett*, 90 N. Y. 267; *K. Co.* v. *Murray*, 90 Hun, 554.) A reasonable time to remove the goods in question had not elapsed after the unloading of the steamer, and, therefore, the liability of the defendants as common carriers was not transformed into a liability as warehousemen. (*Dunham* v. *R. R. Co.*, 46 Hun, 245; *Wood* v. *Crocker*, 18 Wis. 345; *Parker* v. *Ry. Co.*, 30 Wis. 689; 5 Am. & Eng. Ency. of Law [2d ed.], 270; *Hedges* v. *R. R. Co.*, 49 N. Y. 223; *R. R. Co.* v. *Hatch*, 52 Ohio St. 408.) The defendants are the proper parties defendant in this action. (*Springer* v. *Westcott Co.*, 166 N. Y. 117; *De Renner* v. *Brown*, 165 N. Y. 410; *McClure* v. *Trust Company*, 165 N. Y. 108; *Leary* v. *U. S.*, 14 Wall. 607.)

The defendants can establish no exemption from liability under the provisions of the bill of lading. (*Tarbell* v. *R. E. S. Co.*, 110 N. Y. 170; *Gleadell* v. *Thompson*, 56 N. Y. 194; *Grand* v. *Livingston*, 4 App. Div. 589; *The Titania*, 131 Fed. Rep. 229.)

HAIGHT, J. This action was brought to recover of the defendants, as common carriers, the value of seven hundred bags of hemp seed shipped on board the steamer *Louise* from the port of Hamburg in Germany to the plaintiff's assignor in New York. The vessel arrived at New York on the 8th day of May, 1901, and was berthed at pier four, American Dock Stores, at Staten Island, at about twelve o'clock noon of that day. There is some question as to the notice given to the plaintiff's assignor of the arrival of the vessel, but it is admitted by the plaintiff that notice was received from the owners of the dock of the arrival of the vessel between two and three o'clock of that day. It appears that the unloading of the hemp seed was concluded on the day following; that the same was placed on the pier and that at about five o'clock of that day the pier collapsed and the seed was precipitated into the water and rendered valueless.

The complaint alleged two causes of action. It first alleged a violation of the defendants' contract as a common carrier, by reason of their failure to deliver the goods; and the second charged negligence in having failed to exercise reasonable care and diligence in selecting a suitable place in which to deposit the seed.

The answer put in issue the allegations of the complaint and denied that the defendants had such ownership or interest in the vessel as would render them liable as common carriers, claiming that they acted merely as agents of the owners of the steamer, and further alleged that the contract, as contained in the bill of lading, had been fully performed by them. At the close of the evidence both parties moved that a verdict be directed in their favor, and thereupon the court decided in favor of the plaintiff, to which an exception was taken by the

defendants. There was no motion made on their behalf to submit any question of fact to the jury. It, therefore, follows that the trial judge was authorized to determine all questions of fact which were involved in the case. The trial court, however, in directing a verdict for the plaintiff, remarked, with reference to the plaintiff's contention, that the doctrine of *res ipsa loquitur* applied as to the collapse of the dock, had been fully rebutted by the evidence given upon the trial, and that he directed a verdict for the plaintiff upon the other questions in the case.

The defendants were doing business as co-partners under the firm name of "H. Vogemann," consisting of H. Vogemann, Sr., H. Vogemann, Jr., and John H. Gans. The owner of the steamship *Louise* was Carl Hirshberg, and the bill of lading was executed by the senior member of the firm in Hamburg, Germany, on the 21st day of April, 1901, "For the captain, H. Vogemann." The charter party was executed in the city of New York on the 25th day of April, 1900, between the agents of the owner and the Hudspeth Transatlantic Line, as charterers, of the city of Richmond, Virginia. By it the owners agreed to let, and the charterers agreed to hire, the steamship from the time of delivery for a period of twelve calendar months. The cargoes were to be laden and discharged "in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide." It was also provided in the charter party that the captain (although appointed by the owners) shall be under the orders and directions of the charterers as regards employment, agency or other arrangements, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain's signing bills of lading or otherwise complying with the same; and also that, in the event of loss from any accident to the cargo by detention or loss of time, the same shall be at the charterers' risk and expense. The charter party was assigned to the defendants on August 20th, 1900.

The fact that the charter party gives the charterers the absolute right of selecting the dock, wharf or place for the discharge of the cargoes with which the vessel is laden, provided only that the steamer shall always lie safely afloat at any tide, and the further provision that the charterers agree to indemnify the owner from all consequences or liabilities that may arise from the signing of bills of lading, in our opinion is an answer to the contention of the defendants that the owner of the vessel was liable in their stead for the damages resulting to the plaintiff. (*Auten* v. *Bennett*, 183 N. Y. 496, and authorities there cited.)

We are thus brought to a consideration of the question as to whether the defendants are liable, under the circumstances of this case, as common carriers. It appears to be conceded that the rule of the common law is that, where the contract is to carry goods by water, from port to port, the carrier retains his character as such, with the attendant liability as insurer, until the goods have been delivered to the consignee, either actually or constructively, and that to constitute a constructive delivery there must be a notice of the arrival of the vessel at the place of docking, and a reasonable time thereafter given for the removal of the goods by the consignee, and that in case of his failure to appear and take charge of the goods the carrier may place them in a place of safety for storage, giving notice thereof and thus be relieved from further liability with reference thereto. (*The Eddy*, 5 Wall. 481, 495.) It is contended, however, in this case that the rule of the common law had been changed by the agreement of the parties as incorporated in the bill of lading. It is as follows: "Goods to be taken from the ship by the consignee directly they come to hand in discharging the ship and the carrier's responsibility to cease package by package immediately the goods leave the ship's deck or tackle. If not taken from alongside by the consignee they will be landed and deposited at the expense of the consignee and at his risk of fire, loss or injury on the dock or in the warehouse or in craft." As to this provision of the contract it is contended on behalf of the defendants that no notice

of the arrival and docking of the vessel was required to be given as a condition precedent of their right to unload upon the dock, and that after they had unloaded upon the dock their liability as a carrier became so modified as to make them liable only for injury resulting from their own negligence until such a time as they should give notice to the consignee and a reasonable time had elapsed for the removal of the goods. The reliance of the appellants in support of this contention is chiefly placed upon the cases of *Gleadell* v. *Thomson* (56 N. Y. 194); *Collins* v. *Burns* (63 N. Y. 1), and *Constable* v. *Nat. S. S. Co.* (154 U. S. 51).

In *Gleadell* v. *Thomson* the action was brought by the carrier for the freight and charges specified in the contract. The plaintiff had received a quantity of sheet iron to carry by ship from London to the port of New York. After the arrival of the vessel the sheet iron was unloaded during the night upon the pier and the defendants had sent tarpaulins by their own servants to cover the iron and protect it from injury from an impending storm. While the defendants' agents were engaged in placing the tarpaulin over the iron a large piece of the tarpaulin was forcibly taken from them by persons in the employ of the plaintiff, against their protest, to cover the hatch of the ship, thus leaving a portion of the sheet iron unprotected from the storm. The defendants sought to offset the damages thus resulting to them to the plaintiff's claim for freight and this court held they were entitled to recover. In delivering the opinion of the court, however, it was said by ANDREWS, J., that "The landing of the goods upon the pier of the plaintiff under the circumstances of this case did not, we think, change his relation to the goods and divest him of his custody of them as a carrier. The privilege to make this disposition of them was secured to him by the bill of lading unless the consignee was ready to take the goods from the ship whenever it was ready to discharge. It was not incumbent upon the plaintiff to give notice of a readiness to discharge the goods as a condition of his exercising the privilege of depositing them upon the pier.

They, however, remained after such deposit in his custody as carrier, subject to the modified responsibility created by the contract, until after notice had been given to the consignees of their arrival, and a reasonable time had elapsed for their removal. Meanwhile, the defendants assumed the risk of fire, loss or injury to the goods, according to the contract; but the language used did not exempt the plaintiff from liability for an injury resulting from his own negligence."

It is upon that portion of the opinion stating "It was not incumbent upon the plaintiff to give notice of a readiness to discharge the goods as a condition of his exercising the privilege of depositing them upon the pier" that the defendants base their claim in this case. It will be observed, however, that in that case the agents and servants of the consignee were actually present upon the dock trying to preserve their property from injury by covering it with tarpaulins which they themselves had furnished, but which had been forcibly taken from them by the plaintiff. It is, therefore, apparent that the clause of the opinion specifically referred to by the defendants in this case was not involved in the question under consideration in that case and it cannot be considered as a final determination of the question as to whether notice is or is not necessary to be given. In this connection attention is called to the case of *Tarbell* v. *Royal Exchange Shipping Co.* (110 N. Y. 170, 180), in which the same learned judge, speaking for the court, says with reference to the question of notice: "The obligation of the shipowner is not only to carry the goods to the port of destination, but to deliver them there to the consignee. But a delivery which will discharge the carrier may be constructive and not actual. To constitute a constructive delivery the carrier must, if practicable, give notice to the consignee of the arrival, and when this has been done and the goods are discharged in the usual and proper place, and reasonable opportunity afforded to the consignee to remove them, the liability of the carrier, as such, terminates. The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. Both obliga-

tions are to be reasonably construed, having reference to the circumstances. The stringent liability of the carrier cannot be continued at the option, or to suit the convenience of the consignee. The consignee is bound to act promptly in taking the goods, and if he fails to do so, whatever other duty may rest upon the carrier in respect to the goods, his liability, as insurer, is by such failure terminated."

In the case of *Collins* v. *Burns* the goods were shipped from Liverpool to Jersey City and were deposited upon the wharf of the defendant, which was an inclosed warehouse. The consignee had been given notice and had removed part of the goods, but a portion had been stolen from the warehouse through the negligence of the defendant's gatekeeper, and the action was brought to recover for such goods. It was held in that case that the defendant was liable as warehouseman. This liability existed at common law, and there is nothing in that case that aids us in determining the question now under consideration.

In the case of *Constable* v. *Nat. S. S. Co.* (154 U. S. 51) the consignee sought to recover from the defendant goods which had been destroyed by fire after they were landed upon the dock. The defendant maintained a line of steamers plying regularly between Liverpool and New York as common carriers, having a regular pier in the North river, at which it usually docked its vessels. Upon the arrival, however, of the vessel bringing the plaintiff's goods the pier was occupied by other vessels, and was so blocked by ice that the vessel could not reach the dock. The agent of the defendant, therefore, procured from the Inman Steamship Co. a permit to land at its dock, which was six hundred feet distant from the defendant's dock. The goods of the consignee were at once landed upon the Inman dock and subsequently destroyed by fire before notice of such landing had been given to the consignee. The defendant had obtained a permit from the custom house to discharge freight, and notice of the time and place of discharge was posted on the bulletin board of the custom house, and thereupon the discharge of the cargo from

the vessel was commenced at 4:30 o'clock in the afternoon. The court held that the defendant was not liable. The bill of lading was substantially in the same form as that now under consideration. Mr. Justice BROWN, who delivered the prevailing opinion of the court, concedes the common law of the sea with reference to the delivery of a cargo and the liability of the carrier to be the same as that to which we have referred. He claimed, however, that under the modern custom of transacting business by the large transatlantic passenger steamers, such as that under consideration, which arrive and depart upon regular schedule days, of which the public has notice, where the consignees of the cargo may be numbered by the hundreds, and the piers of the regular steamship lines are well known to every importer and the day of arrival of each steamer may be predicted almost to a certainty; the necessity for the common-law notice of the arrival and place of discharge of the cargo no longer exists with reference to such vessels and, therefore, he concluded: "1. That the stipulation in the bill of lading that respondent should not be liable for a fire happening after unloading the cargo was reasonable and valid. 2. That the discharge of the cargo at the Inman pier was not in the eye of the law a deviation such as to render the carrier an insurer of the goods so unladen. 3. That if any notice of such unloading was required at all, the bulletin posted in the custom-house was sufficient under the practice and usages of the port of New York. 4. That libellants, having taken no steps upon the faith of the cargo being unladen at respondent's pier, were not prejudiced by the change." In discussing the question with reference to the berthing of the vessel at the Inman pier of the respondent company, the learned justice says: "If it be true that the pier of the respondent company was so blocked that the *Egypt* could not obtain access to it to discharge her cargo, it was, so far from being a deviation, a matter of ordinary prudence to select a neighboring pier for that purpose. Had this cargo been discharged at a *remote, unusual, or inaccessible spot*, or upon an uncovered pier, so that it was exposed to the weather

or to any unusual hazard, and a loss had been incurred, we should not have hesitated to hold the carrier liable, notwithstanding the stipulation against the consequence of negligence in its bill of lading."

It will be observed, however, that the learned justice's conclusion is based upon the modern custom existing with reference to the great transatlantic steamships engaged in carrying passengers and light freight, which ply between specified ports, running upon schedule time so that consignees of freight know almost to a certainty the day on which their goods will arrive. Under such circumstances, he holds that the notice required by the common law should no longer be required, but that posted upon the bulletin board in the custom house should be deemed sufficient. The question thus arises as to whether the rule adopted in that case applies to the one which we now have under consideration. The court might have found that the steamship *Louise* was not run upon any schedule time; that the defendants did not have any separate pier or dock of their own, at which she was always berthed upon her arrival in port; that she was not recognized as one of the swift, great transatlantic passenger steamships, but was generally classed as a freight vessel and that the consignees, therefore, could not estimate or determine with reasonable certainty as to the day on which she would arrive, or at what pier or wharf she should finally find her berth. The bill of lading, as we have seen, is silent upon the question of notice. The rule is that an affreightment contract, modifying or qualifying the carrier's common-law liability, must be strictly construed; and, in so far as it is ambiguous or leaves the intention of the parties in doubt it is to be construed against the steamship company. (*Edsall* v. *Camden & Amboy R. R. & Tr. Co.*, 50 N. Y. 661; *Taylor* v. *Liverpool & G. W. S. Co.*, L. R. [9 Q. B.] 546; Bishop on Contracts, 411; Carver on Carriers, § 77.)

Under the bill of lading, as we have seen, the goods are to be taken from the ship by the consignee directly as they come to hand in the discharging of the ship. As we understand

this, the consignee has the right to take the goods *directly from the ship* as soon as it has been berthed and the master is ready to discharge the cargo. The consignee may, therefore, relieve himself from liability to the warehouseman, or from the risk of fire, or loss or injury on the dock, to which the vessel may be moored. But how can he do this unless he has notice of the arrival and place of berth? Under the common law he was entitled to such notice if practicable. But he cannot be permitted to unreasonably delay the vessel in the discharge of her cargo. As was said by ANDREWS, J., in *Tarbell* v. *Royal Exchange Shipping Co.* (*supra*): "The stringent liability of the carrier cannot be continued at the option, or to suit the convenience of the consignee. The consignee is bound to act promptly in taking the goods, and if he fails to do so, whatever other duty may rest upon the carrier in respect to the goods, his liability, as insurer, is by such failure terminated." He must, therefore, maintain a known residence or a place of business where notice may reach him speedily, and be prepared to act promptly.

Again, referring to the facts in this case, it will be observed that the plaintiff did have notice between two and three o'clock of the day of the arrival of the vessel and of her docking at a pier on Staten Island. The freight of the plaintiff consisted of seven hundred bags of hemp seed. The duty devolved upon the trial court of determining the facts. Was the character and business of this vessel such as to bring her within the rule prevailing with reference to large transatlantic passenger steamers, or did she discharge her cargo at a remote, unusual or inaccessible spot, within the exception to the rule, and was notice given of her arrival to the plaintiff and a reasonable time given him to appear at the berth of the vessel and take charge of the freight, considering its character, quantity and place of discharge? Under the manner in which the parties submitted this case to the trial court these questions of fact must be deemed to have been determined in favor of the plaintiff. We, consequently, conclude that the defendants were not relieved of their liability as

common carriers by a discharge of the goods upon the dock, under the circumstances of this case, and that such liability is not dependent upon the question whether they were guilty of negligence with reference to their destruction.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, VANN, WERNER and HISCOCK, JJ., concur; WILLARD BARTLETT, J., not sitting.

Judgment affirmed.

NETTIE BUTLER, Respondent, *v.* MICHIGAN MUTUAL LIFE INSURANCE COMPANY, Appellant.

INSURANCE (LIFE) — BREACH OF WARRANTY — FALSE STATEMENTS TO MEDICAL EXAMINER AS TO HEALTH OF INSURED — INSURANCE COMPANY NOT BOUND BY TRUE STATEMENTS MADE TO SOLICITING AGENT. The fact that the insured disclosed to the soliciting agent of a life insurance company the true state of his health and physical condition before going to the medical examiner is not a good reply in an action brought on the policy issued to him, to the defense of a breach of warranty, in that statements made by him to the medical examiner were false; especially where it appears from the application that the only information to be obtained by the agent related to the occupation, age, place of birth and other insurance; and that inquiries as to the health of the insured, his previous or existing ailments, former attention by physicians and similar matters were exclusively within the domain of the medical examiner and were wholly beyond the scope of the solicitor's duties or functions; so that notice or information as to the health or physical condition of the insured given to the soliciting agent could not bind the company.

Butler v. *Michigan Mutual Life Ins. Co.*, 93 App. Div. 619, reversed.

(Submitted March 13, 1906; decided March 20, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 27, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Thomas Watts and *Abram F. Servin* for appellant. The false statements in question being warranties, knowledge on

the part of any agent of the company will not aid plaintiff to recover. (*Foote* v. *A. L. Ins. Co.*, 61 N. Y. 571; *Cushman* v. *U. S. L. Ins. Co.*, 63 N. Y. 404; *Schane* v. *M. L. Ins. Co.*, 76 App. Div. 271; *Barteau* v. *P. L. Ins. Co.*, 67 N. Y. 595; *Clemans* v. *Supreme Assembly*, 131 N. Y. 485.) The court erred in charging that if the soliciting agent, Freeman, had full information in regard to the truth and did not insert it in the application, the plaintiff could recover. (*Russell* v. *P. Ins. Co.*, 176 N. Y. 178; *Hackett* v. *Supreme Council*, 44 App. Div. 524; *O'Farrell* v. *M. L. Ins. Co.*, 44 App. Div. 554.)

Henry Bacon for respondent. The writer of the application was the agent of the defendant. (*Ins. Co.* v. *Wolff*, 95 U. S. 326; *Whited* v. *G. Ins. Co.*, 76 N. Y. 415; *Robbins* v. *S. F. Ins. Co.*, 149 N. Y. 477; *Quinn* v. *M. L. Ins. Co.*, 10 App. Div. 483.) The knowledge of the agent was the knowledge of the defendant, his principal. (*Van Schoick* v. *N. F. Ins. Co.*, 68 N. Y. 434; *Whited* v. *G. Ins. Co.*, 76 N. Y. 415; *Miller* v. *P. M. Ins. Co.*, 107 N. Y. 292; *O'Brien* v. *H. B. Society*, 117 N. Y. 310; *Sternaman* v. *M. Ins. Co.*, 170 N. Y. 13; *Quinn* v. *M. Ins. Co.*, 10 App. Div. 483; *Hayes* v. *S. & W. Ins. Co.*, 81 App. Div. 287.)

CULLEN, Ch. J. The action was brought to recover the amount of a life insurance policy; the defense breach of warranty, in that the statements made to the medical examiner were false. As the decision of the Appellate Division was unanimous, and there are no exceptions to rulings on evidence, the only question before us arises on the charge of the trial court. But that question goes to the whole merits of the case.

The falsity of the answers to the questions by the medical examiner was proved by the defendant and not controverted on the trial. To avoid the effect of this defense, the plaintiff gave testimony tending to prove that the true facts concerning the health of the insured had been disclosed to one Freeman, a soliciting agent of the defendant, before the insured went to the medical examiner for examination. As to

what transpired before the medical examiner as to what answers were made by the insured to the questions propounded him there is no proof except the answers as written in the application and signed by the insured. Freeman denied that the insured had disclosed to him the true facts concerning his health and previous medical attendance. The case went to the jury on the sole issue of the disclosures to Freeman, the learned trial court charging: "If the agent of the insurance company — if there was disclosed to him by the deceased the facts in regard to the medical attendance upon him, and the statements or facts as to what he was suffering from, the complaint from which he was suffering, and the agent of the company did not choose to put it down or don't write down, put it all down, why that does not defeat the recovery upon the insurance policy. Now, the agent, Mr. Freeman, to whom it is claimed those statements were made, denies it, and that raises the question flatly." To this charge the defendant excepted. The court was requested to instruct the jury "That the agent, Mr. Freeman, had no right to record his (insured) answers to the medical questions, or as to the physical condition." This was refused, and the defendant excepted.

By the written application the insured warranted that the statements contained therein, as well as those made to the medical examiner, whether written in his own hand or not, should form the basis of the contract of insurance, and that if untrue or fraudulent that should avoid the policy. The evidence concerning the scope of Freeman's agency is most meagre, but such as it is shows that he was merely a soliciting agent. There is nothing to warrant an inference that he was anything more. The only testimony given by the plaintiff on the subject, or indeed given by either party, was of a witness who was present when the insured signed the application, who said: "As I understand it, Mr. Freeman was the agent of this company. I heard him and my brother talk over the matter of this insurance." On the application is indorsed: "Recommended by C. S. Freeman, agent, Williams Parsons, superintendent." In the application is found written

in large type, "☞ Before sending this application to the Home Office, be sure each and every question is answered and that the age and date of birth agree." There was no proof or suggestion on the trial that Freeman was authorized to effect insurance, or to issue policies, and what has been quoted from the application negatives any such claim. Indeed, it seems to have been assumed on the trial that Freeman was a mere soliciting agent, as appears by the charge of the court.

The question is, therefore, sharply presented whether the disclosure to the soliciting agent of an insurance company of the true state of the health and physical condition of the insured is a good answer to the defense of breach of warranty by reason of the falsity of the responses to the questions propounded by the medical examiner. We have recently held that if the insured truly answers the questions and the medical examiner records those answers erróneously or falsely, such falsity will not avoid the policy, and that is unquestionably the law of this state. (*Sternaman* v. *Metr. Life Ins. Co.*, 170 N. Y. 13.) That, however, is not the question in this case. As already said, there is no evidence, except the application itself, as to how the questions by the examiner were answered. Even if there were such evidence it would not affect the case before us, because the trial court charged that a disclosure to Freeman was sufficient. It is a fundamental principle in the law of agency that for information given an agent to be attributable to his principal the information must be imparted to the agent in the course of his agency. As appears from the instrument the only part of the application to be obtained by the agent related to the occupation, age, place of birth, other insurance or application for the same, and similar matters. Inquiry as to the health of the deceased, his previous or existing ailment, former attendance by physicians and the like fell exclusively within the domain of the medical examiner. Such inquiries lay wholly beyond the scope of the solicitor's duties or functions. "The knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects, and

whose duty it, therefore, is to communicate it to his principal." (Mechem on Agency, § 725; *Welsh* v. *German-American Bank*, 73 N. Y. 424.) "The principle that notice to an agent is notice to the principal is quite familiar, but is only applicable to cases in which the agent is acting in the course of his employment." (*Weisser's Admrx.* v. *Denison*, 10 N. Y. 68.) Under this rule it is plain that notice or information given to Freeman on a subject which lay beyond the scope of his agency, did not charge the defendant. Had Freeman been authorized to effect insurance and issue policies, a very different question would be presented.

The judgment should be reversed, a new trial granted, costs to abide the event.

GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur; WILLARD BARTLETT, J., not sitting.

Judgment reversed, etc.

THE VILLAGE OF ST. JOHNSVILLE, Respondent, *v.* DANIEL SMITH, Appellant, Impleaded with Others.

1. VILLAGES — WATER WORKS — RESERVOIR CONSTRUCTED UPON LAND BEFORE CONDEMNATION PROCEEDINGS ARE HAD AND COMPENSATION AWARDED TO OWNER, CONSTITUTES A TRESPASS. Where the authorities of a village, not only without the consent of the owner, but against his express command and remonstrance, entered upon his lands and constructed thereon an intake or reservoir for the village water works and laid pipes for conducting water to and from the reservoir, before instituting condemnation proceedings, such entry and invasion is clearly tortious, the village and its agents being mere trespassers, notwithstanding a survey had been made and a map of the land and water rights proposed to be taken had been filed under the statute then in force (L. 1875, ch. 181, § 5, as amd. by L. 1885, ch. 211 and L. 1895, ch. 383); since the mere making and filing of the map did not empower the village to take possession of the premises described therein and erect a water plant thereon; it is only after condemnation proceedings have been had and confirmed by the Supreme Court and the compensation awarded to the landowner has been paid or deposited in court, that the village becomes entitled to take and hold the property (L. 1875, ch. 181, § 6, subd. 8, as amd. by L. 1885, ch. 211); the only entry which the statute authorizes to be made before condemnation is "for the pur-

pose of making surveys and to agree with the owner" as to the amount of compensation. (L. 1875, ch. 181, § 4, as amd. by L. 1885, ch. 211 and L. 1895, ch. 383.)

2. SAME — AWARD TO OWNER, MADE AFTER CONSTRUCTION OF RESERVOIR SHOULD INCLUDE VALUE OF CONSTRUCTION AND WORK PLACED UPON LAND. Where condemnation proceedings were subsequently instituted and an award was made to the owner for the land and water rights taken by the village, in which the commissioners of appraisal expressly declared that, in making the award, they made no allowance "for the value of the pipe, the intake basin or the superstructure covering the same nor for any of the work or construction placed upon the appraised premises * * *, or for any enhanced value of the premises by reason of such construction having been placed thereon," such award is erroneous, since the landowner is entitled to have the value of the structures placed upon his premises by the village, without authority of law, before the institution of the condemnation proceedings, considered by the commissioners of appraisal in arriving at their determination as to the compensation which ought justly to be made to him by reason of the taking of his lands.

3. SAME — RULE FOR ASCERTAINING MEASURE OF COMPENSATION. In ascertaining the compensation to be awarded, the measure of such compensation is neither the cost of the improvements nor their value or the value of their use to the village; the true inquiry is how much do the improvements placed upon the property enhance the value of the owner's land.

Village of St. Johnsville v. *Smith*, 90 App. Div. 618, reversed.

(Argued February 7, 1906; decided March 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 11, 1904, which affirmed a final order confirming the report of commissioners in condemnation proceedings.

The facts, so far as material, are stated in the opinion.

Clark L. Jordan for appellant. The award of the commissioners was inadequate. The commissioners should have awarded the defendant the value of the structure placed upon his lands by the plaintiff, without any right or authority, in addition to the damages sustained by him in the taking of his land and water rights. (Reeves on Real Prop. § 47; *Matter of N. Y., W. S. & B. R. R. Co.*, 37 Hun, 317; *McAllister* v. *N. Ins. Co.*, 156 N. Y. 80; *Van Size* v. *L. I. R. R. Co.*, 3 Hun, 613; *U. S.* v. *Monterey Co.*, 47 Cal. 525.)

Edward R. Hall for respondent. The award made by the commissioners was adequate and they did not err in refusing to allow the appellant for the value of the pipes, the intake basin or the superstructure covering the same, or the construction placed upon the appraised premises by the respondent or for any enhanced value of the premises by reason of such construction having been placed thereon by respondent. (*Matter of S. L., etc., R. R. Co.*, 66 Hun, 306; *B., R. & M. R. R. Co.* v. *Bernard*, 9 Hun, 104; *Vil. of Champlain* v. *McCrea*, 165 N. Y. 264; *Justice* v. *N. Y. R. Co.*, 87 Penn. St. 28.)

WILLARD BARTLETT, J. This is a proceeding in behalf of an incorporated village to acquire certain lands and water rights of the appellant for the purpose of obtaining for the village an additional supply of pure and wholesome water. It was instituted in 1896, before chapter 181 of the Laws of 1875, entitled "An act to authorize the villages of the State of New York to furnish pure and wholesome water to the inhabitants thereof," had been repealed by the Village Law (Chap. 414 of the Laws of 1897, taking effect July 1, 1897), and hence was regulated by the act of 1875 and the amendments thereof in force at the time, and by the provisions of the Condemnation Law (Code Civ. Proc. chap. XXIII). An answer to the petition was interposed by the appellant and others; the issues were referred to a referee, who determined them in favor of the petitioner; commissioners were appointed who awarded $500 to the appellant for the property and rights belonging to him which were sought to be acquired, and the report of the commissioners was confirmed at Special Term by a final order, which has been unanimously affirmed by the Appellate Division.

Upon this appeal a number of objections are made to the validity and regularity of the proceeding which we do not deem it necessary to discuss further than to say that we regard them as untenable, and we find no error in the record justifying the interference of this court, save in respect to the action of the commissioners in estimating the value of the property taken.

The original petition was verified on May 26, 1896, and it is stipulated by the parties that it was served on the appellant on or before June 1, 1896. It is apparent, therefore, that the proceeding cannot be regarded as having been instituted before May 26, 1896. As early as September 25, 1895, however, the authorities of the village of St. Johnsville had commenced to construct an intake basin and lay pipes on the lands of the appellant, which it desired to condemn, and the work was so far completed that water was turned into the pipes and taken for the use of the village on October 25, 1895, while the superstructure over the basin and other work by the village on such lands was completed by the 16th of January, 1896.

Neither the reservoir nor the piping nor any portion of the structures thus placed upon the premises of the appellant were taken into consideration by the commissioners in estimating the value of the land upon which they had been located. The commissioners make this perfectly clear in their report where they expressly declare that in fixing the appellant's compensation at $500 they do not make any allowance "for the value of the pipe, the intake basin or the superstructure covering the same nor for any of the work or construction placed upon the appraised premises by the plaintiff, or for any enhanced value of the premises by reason of such construction having been placed thereon by the plaintiff."

It is conceded that the appellant forbade the entry upon his land; and the engineer who supervised the work for the village testified that he understood that whatever was done was done in opposition to the will of Mr. Smith. There is a statement in the brief for the respondent to the effect that "apparently he subsequently consented," but we can find no sufficient basis in the evidence for any such inference. In disposing of the appeal we think it must be treated as an established fact that the invasion of his property by the village was not only without the consent of the appellant, but against his express command and remonstrance.

Under these circumstances, we think that the landowner was entitled to have the value of the structures thus placed upon

his premises by the village, without authority of law, before the institution of the condemnation proceedings, considered by the commissioners of appraisal in arriving at their determination as to the compensation which ought justly to be made to him by reason of the taking of his lands.

The invasion of the appellant's property was clearly tortious, the village and its agents being mere trespassers. (*Matter of St. Lawrence & Adirondack R. R. Co.*, 133 N. Y. 270.) It is true that a survey and map, as provided by section 5 of the statute (Chap. 181, Laws of 1875, as amended by chap. 211 of the Laws of 1885) had been made and filed prior to this entry, showing the appellant's land and water rights which the board of water commissioners of the village intended to acquire; but the mere making and filing of this map did not empower the village authorities to take possession of the premises described therein and erect a water plant thereon. It was only after a determination by commissioners of appraisal fixing the compensation which ought justly to be made to the landowner, and after a confirmation of their report by the Supreme Court, and upon payment or deposit of the sum fixed as compensation that the village became entitled to take and hold the property. (Subd. 8 of section 6 of chap. 181 of the Laws of 1875, as amended by chap. 211 of the Laws of 1885.) The only entry which the statute authorized to be made before condemnation was "for the purpose of making surveys and to agree with the owner" as to the amount of compensation. (Chap. 181, Laws of 1875, § 4, as amended by chap. 211, Laws of 1885, as amended by chap. 383, Laws of 1895.) The entry and occupation here were obviously of a very different character, the appropriation of the premises to the uses of the village being as absolute and permanent as it could ever become upon the successful completion of condemnation proceedings, before any petition in such proceedings had even been verified.

The question which arises here has twice been considered by the Supreme Court at General Term — first in *Matter of Long Island R. R. Co.* (6 Thomp. & Cook, 298) in the second

department, and later in the fourth department in *Matter of N. Y., West Shore & Buffalo Ry. Co.* (37 Hun, 317).

In the first of these cases the railroad company, before instituting proceedings to condemn, laid its tracks upon the appellant's land. The appellant sought to prove before the commissioners that the entry was made without the owner's consent and claimed compensation for the increased value created by the improvements which the railroad had made by laying its tracks upon the land. The court held that the commissioners erred in rejecting the evidence offered to establish the entry without consent and the value of the improvements made by the trespasser, saying: "We are of opinion that the railroad company, if they entered without consent, were trespassers as to the then owner * * * and that any fixtures they placed on the land, while their occupation was that of trespassers, belong to the owner who is such at the time of making the valuation." As to the method in which the damages were to be ascertained, the court added: "In making such proof we do not understand that the value of each tie and rail is to be determined; the railway track composed of rails and ties is a fixture of the land and its value as a fixture enhancing the value of the land for the beneficial enjoyment thereof is the measure of compensation."

In the second case cited the gist of the decision is contained in the following extract from the opinion of Mr. Justice BOARDMAN: "Any structure wrongfully placed upon the lands by the railway company became by that act a part of the land and entered into its value. The case tends to show that the railway company entered upon the lands in question without right or authority from the owners and built the road in part thereon. The property so put upon the land added to its value and was properly included in the appraisal as property of the landowners to be taken by the railroad company."

We are of opinion that these cases were correctly decided and that the rule of law therein applied entitles the appellant in the case at bar to a new appraisal. This rule has been recognized and enforced by the courts of other states. The

case of *United States* v. *Land in Monterey County* (47 Cal. 515) was a proceeding commenced by the Federal government in 1870 to acquire lands in California for lighthouse purposes. In 1854 the United States, by its agents, entered upon the lands sought to be condemned and erected a stone building for lighthouse purposes thereon. This was done against the will of the owners. At the trial they offered evidence in regard to the value of the structure, claiming that inasmuch as it had been tortiously affixed to the freehold its value should be considered in determining the compensation to which they were entitled. The Supreme Court of California held that this evidence was erroneously excluded. "There can be no doubt," said WALLACE, Ch. J., "that upon the general principles of law the defendants, as being owners of the fee, are also owners of the improvements and fixtures actually annexed to the soil and these become a part of it. If one erect buildings upon the land of another voluntarily, and without any contract, he may not remove them. This is common learning. The law did not authorize the United States to take possession of these lands *manu forti*, and their agents in entering upon them and ejecting the defendants were mere tort feasors."

In *Graham* v. *Connersville, &c., R. R. Co.* (36 Ind. 463) it was held that where a railroad company, without having acquired the right so to do, had in advance of condemnation proceedings entered upon the land subsequently sought to be condemned and erected a depot and hotel thereon, these buildings became the property of the landowner and should have been included in estimating the value of the property when the damages were assessed. "If this rule seems to savor of hardship," said the court, "the company has no one to blame but itself for not having avoided its application."

The doctrine thus asserted is stated by Mills in his well-known treatise on the Law of Eminent Domain as follows: "A trespasser is not entitled to any benefit for improvements made on the land during the time of his occupation. Houses erected on the land of another belong to the owner, without

compensation to the party erecting, except where legislatures have granted relief to those who have made improvements on land in good faith, believing they had good title. The rule follows that all erections belong to the owners, and cannot be removed by the parties placing them there; and hence, on a subsequent condemnation, the value of the land, with the structures also, must be paid." (Mills on Eminent Domain [2d ed.], § 148.) Lewis, however, another text writer of ability, declares that the cases which we have cited "proceed upon a strict and technical rule of the common law, that structures placed upon land by a trespasser become a part of the realty and cannot be removed," and he refers to a considerable number of decisions in other jurisdictions to the effect that "the owner in a proceeding to ascertain the just compensation is not entitled to the value of the works placed upon the property, though without right, for the purpose of adapting the property to the public use intended." (2 Lewis on Eminent Domain [2d ed.], p. 1144.) The scope and effect of the group of cases sustaining this proposition is accurately stated by Mr. Carman F. Randolph, of New Jersey, in a still more recent work on this branch of the law, where he says: "The broad ground is taken that while an irregular entry for public use is a technical trespass, yet the title to improvements should not vest in the owner because the possession can be legitimated by lawful proceedings, and for the broader reason that the improvements themselves are not intended to be adjuncts to the freehold, but are made simply to subserve a use in which the landowner has no interest." (Randolph on Eminent Domain, p. 222.) *Justice* v. *Nesquehoning Valley R. R. Co.* (87 Pa. St. 28) is typical of the class of cases which give countenance to this view.

We are quite clear that it should not receive the sanction of the courts of this state. So far as actual intent is concerned, a personal trespasser who annexes a structure to another's freehold does not mean that it shall become the property of the landowner any more than does a trespassing railway company or municipality which does the same thing

in contemplation of acquiring the land at some future time by the exercise of the power of eminent domain. The law affixes the consequences to the act, not the intent. It says to those who invoke the power of eminent domain as well as to all others: If you invade land without legal right and place structures of a permanent character thereon, those structures belong to the landowner. There is no more harshness in applying the rule to one class of trespassers than to the other. In both cases its application tends to prevent the perpetration of a wrong. Its operation in this state has been, and will undoubtedly continue to be most salutary in constraining those municipal and other corporations which the state has authorized to exercise the power of eminent domain not to assume the possession of lands in advance of any right so to do, and thus practically nullify, during the period of unlawful possession, that provision of the Constitution which guarantees the citizen against being deprived of his property for public use without just compensation.

The difference is obvious between a clear case of trespass like that before us and a case in which after a lawful entry, followed by improvements upon the land, the occupant finds it necessary to institute condemnation proceedings by reason of a doubt as to the title or for the extinguishment of liens upon the property. "It may be assumed as the law," said Mr. Justice CULLEN in *Philadelphia, R. & N. E. R. R. Co.* v. *Bowman* (23 App. Div. 170), "that where a railroad company lawfully enters into possession of premises and thereafter institutes condemnation proceedings to cure a defective title, or extinguish the lien of a mortgage or other incumbrances, the measure of compensation is not enhanced by the improvements placed by the railroad company on the land," although he adds that even this proposition is not authoritatively settled in this state. But further on in the opinion the rule in this state, as in California, is declared to be that the improvements go to the landowner, where a railroad company has entered without his permission, as a mere trespasser; and the land-

owner is entitled to compensation for such improvements in a proceeding to condemn.

There is nothing in *Matter of St. Lawrence & Adirondack R. R. Co.* (66 Hun, 306), cited in the respondent's brief, which affects the question under consideration. Section 3379 of the Code of Civil Procedure (which is a section in the Condemnation Law) provides that at any stage of a proceeding to condemn, the court may authorize the plaintiff, if in possession of the property sought to be condemned, to continue in possession upon giving such security or depositing such sum of money as the court may direct. The General Term in the case cited recognized the construction put upon that section by this court in *Matter of St. Lawrence & Adirondack R. R. Co.* (133 N. Y. 270), where it was held not to apply to a railroad company which had entered upon land under no claim or pretense of right, in defiance of the will of the owner, under no mistake or misapprehension and without color of authority; and the General Term then proceeded to hold that possession was properly allowed to continue upon giving security under section 3379 where it appeared to the Special Term that the plaintiff had not acquired such possession by a trespass or without color of claim.

In holding, as we do, that the appellant is entitled to have the improvements made upon his land by the respondent while a trespasser taken into consideration in ascertaining his compensation, it must be distinctly understood that the measure of such compensation is neither the *cost* of the improvements *nor their value or the value of their use to the village.* The true inquiry is how much do the improvements placed upon the property enhance the value of the appellant's land.

The orders of the Appellate Division and the Special Term should be reversed, with directions to appoint new commissioners of appraisal to determine the appellant's compensation in accordance with this opinion, with costs in all courts to appellant.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT and VANN, JJ., concur; CHASE, J., not sitting.

Ordered accordingly.

NANCY GOODSPEED, Appellant, *v.* ITHACA STREET RAILWAY COMPANY, Respondent.

1. STATUTE INFLICTING PENALTIES — CONSTRUCTION. Where there is a reasonable doubt as to the construction of a statute prescribing a penalty for its violation, the party of whom the penalty is claimed is entitled to the benefit of it.

2. RAILROAD — UNLAWFUL FARE — MISTAKE OF LAW. The Railroad Law (L. 1890, ch. 565, § 39, amd. L. 1892, ch. 676), inflicting a penalty for exacting an unlawful rate of fare unless the "overcharge was made through inadvertence or mistake not amounting to gross negligence," contemplates that the mistake relieving the corporation from the penalty may be one of law as well as one of fact; and where there is shown to have been a mistake by the corporation in the construction of its statutory rights, a mistake, not the result of carelessness in being advised upon the subject, but an honest mistake, such as would govern the conduct of an ordinarily prudent person honestly desiring to act within his rights, the corporation is exempt from the penalty.

3. STREET RAILROADS — PENALTY FOR EXCESSIVE CHARGE BY STREET RAILWAY COMPANY — WHEN COMPANY OVERCOMING CERTAIN GRADE NOT LIABLE FOR PENALTY. A street railroad company having a railroad which overcomes in its route an elevation exceeding 300 feet to the mile, within a distance of two miles, is not liable for the penalty imposed by section 39 of the Railroad Law (L. 1890, ch. 565) for charging and collecting a fare of ten cents for a continuous ride over its road where the company, acting in good faith and laboring under an honest mistake of law, which was not the result of carelessness in being advised as to its rights, construed the statute (Railroad Law, § 37) as comprehending within its operation a street railroad corporation, since section 39 of the Railroad Law, assuming its applicability to a street railroad corporation, may be read as including within its exemption from the penalty cases of mistakes in law as well as mistakes in fact.

Goodspeed v. *Ithaca St. Ry. Co.*, 88 App. Div. 147, affirmed.

(Argued March 12, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 18, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

H. H. Rockwell for appellant. The decision of the trial court and the Appellate Division, "that in exacting and receiving from the plaintiff an unlawful rate of fare, the defendant acted under a mistake of law not amounting to gross negligence, and was, therefore, not liable for the penalty," was error. (L. 1890, ch. 565, § 90; *People* v. *Clute*, 50 N. Y. 463.)

S. D. Halliday for respondent. If the fare asked of the plaintiff was more than the lawful rate it was an overcharge made through mistake not amounting to gross negligence, and the defendant is, therefore, not liable. (*Parker* v. *E., C. & N. R. R. Co.*, 27 Hun, 383; 165 N. Y. 274.)

GRAY, J. This appeal involves the construction of section 39 of the Railroad Law, which provides that "any railroad corporation, which shall ask or receive more than the lawful rate of fare, unless such overcharge was made through inadvertence or mistake, not amounting to gross negligence, shall forfeit fifty dollars, to be recovered," etc. The defendant is a street surface railroad corporation, which operates its road within the city of Ithaca, in this state, and which, upon a certain occasion, collected of the plaintiff, at the time a passenger, a fare of ten cents for one continuous ride. She, subsequently, brought this action; alleging that the fare thus collected was unlawful, for being contrary to the rate permitted by the statute, and demanding judgment against the defendant for the penalty of fifty dollars prescribed by the above section. The trial judge gave judgment in favor of the defendant and dismissed the complaint; making this decision, or finding, namely: "That the defendant exacted and received from the plaintiff at the time mentioned in the plaintiff's complaint an unlawful rate of fare; but I have decided the issues in this case in favor of the defendant upon the ground, which I find to be a fact, that in so doing the defendant acted under a mistake of law not amounting to gross negligence," etc. This was one of the defenses interposed by the defendant and

the judgment sustaining it has been affirmed by the Appellate Division, in the third department, by the unanimous vote of the justices.

The unanimous affirmance below of the judgment is conclusive upon this court, with respect to the finding made by the trial court; unless, as a matter of construction, the mistake, which, under the provision of section 39 of the Railroad Law, exempts the company from the penalty, must be one of fact, only. The application of the section to a street railroad corporation is very seriously questioned by the defendant; but the courts below have deemed it generally applicable to all railroad corporations and, as I have reached the conclusion that the judgment was right, I will not discuss the question of its applicability and I will assume, in that respect, that the view of the courts below was correct.

The situation of the defendant under the Railroad Law was somewhat peculiar and doubtful, as to the rate of fare which it was authorized to collect. Section 37 of that law authorized it to collect a fare of ten cents for one continuous ride within the city, provided that section was applicable to a street surface railroad corporation; for the reason that it overcame in its route an elevation exceeding three hundred feet to the mile within a distance of two miles. Upon that condition existing, "every railroad corporation" was authorized by that section to fix and collect such a rate of fare as was received here. The mistake of the defendant, if such it was, was in construing that section of the statute as comprehending within its operation a street surface railroad corporation. It may be observed, in passing, that legislation has, since, expressly authorized it to make the very charge in question. Was this mistake in the construction of the Railroad Law such an one as came within the legislative intent? I think it was. I think it to be evident, from the use of such broad language, that the legislature intended to exempt from the penalty any railroad corporation which, in good faith and without wrongful intention, had demanded and received a rate of fare in excess of that ordinarily to be charged, upon a mistaken construction of the

statutory grant of right. The word "mistake," when used alone, without any limiting expression, will include, of course, a mistake of law as well as of fact. If its meaning, as used in the statute, was to be narrowed to mistakes upon questions of fact, it would have been proper and more natural for the legislature to say so. It is argued, however, in effect, that it has always been a rule of law, general and familiar as a maxim, that ignorance of the law excuses no one, and that the language of the legislative enactment must be read in its light. The rule thus invoked is, doubtless, of frequent application in civil cases; as when the misapprehension of a right in the interpretation of an agreement is sought to be excused upon the ground of ignorance of the law. But there is a marked distinction between such a case, or where the consequence of a person's act is sought to be avoided by reason of a mistake as to the general rule of law, and the present case for the enforcement of a punishment inflicted by a statute, as a penalty for its violation. Presumably, the legislature, in enacting this section, had in mind the principle that, in the enforcement of a statute giving a penalty, if there be a reasonable doubt, the party, of whom the penalty is claimed, is to have the benefit of it. (See *Chase* v. *N. Y. C. R. R. Co.*, 26 N. Y. 525.)

Perhaps it would not be too great a stretch of language to say that the defendant, in construing the provisions of section 37 of the Railroad Law as granting to it the right, under the circumstances of its construction, to charge a fare of ten cents, labored under a mistake of fact in classifying itself with the railroad corporations aimed at by the section; but I think the broader ground is quite tenable, that the mistake of the defendant as to the construction of the law in question constitutes an exception to, and is not within the operation of, the general rule relied upon. That rule is based upon the presumption that every one knows the law. Such a presumption only obtains, because of the necessity that it should obtain for government to exist. If it were otherwise, the greatest ignorance would confer the greatest license. As it was observed in a recent opinion in this court, "While mistakes in law will

not relieve one from liability for his act, in cases where intent, or good faith, is the issue, the party's knowledge of the law may be material." (See *Knowles* v. *City of New York*, 176 N. Y., at p. 438; *U. S.* v. *Realty Co.*, 163 U. S. 427.) Equity makes the distinction between cases where the ignorance is of a well-known rule of law and cases where the ignorance relates to the doubtful construction of some grant; as was pointed out by Lord CHELMSFORD in the case of *Earl of Beauchamp* v. *Winn*, (L. R. [6 Eng. & Ir. App.] 234). He observed that "there are many cases to be found in which equity upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake." The case is somewhat pertinent, for it involved the construction of a grant in a deed and it was held that ignorance before a decision of what was a true construction of the deed could not be pressed to the extent of depriving the person of relief, on the ground that he was bound himself to have known beforehand how the grant must be construed. I think that the legal presumption of a knowledge of the law is subject to qualification with respect to cases of doubtful construction of grants and that we should hold, in the present case, that the legislature, when prescribing a punishment for the offense, did not intend to foreclose a corporation from relief, where there is shown to have been an honest mistake as to its grant of rights or franchises. It is more just to say that the legislature recognized the equitable distinction in the application of the rule, which refuses to admit the excuse of ignorance of the law, and provided for relief from the penalty in the case of an honest mistake. The question of the defendant's right, or privilege, under the Railroad Law, to charge at a rate of fare in excess of five cents, as prescribed by section 101 of the Railroad Law for a continuous ride, is in principle, essentially similar to the question of the doubtful grant in the deed in the *Earl of Beauchamp's Case*, (*supra*).

In providing for an exemption from the penalty, when the overcharge was made through a "mistake not amounting to

gross negligence," the purpose of the statute may not have been very happily expressed; but the meaning is quite obvious and there should be no real embarrassment. The mistake, which is to be relieved from, must not have been the result of carelessness on the part of the corporation in being advised upon the subject of its legal rights. The circumstances should show that its action was induced, in the particular case, for such reasons as would govern the conduct of an ordinarily prudent person, honestly desiring to act within his rights.

If we did not read section 39 as including within its exemption from the penalty cases of mistakes in law as well as of mistakes of fact, I think that we should be, quite unwarrantably, refusing to admit a distinction in the application of the general presumption of law referred to, which equity recognizes, which is just in itself and which the legislature, from its unqualified language, may well be presumed to have understood.

For these reasons, I advise the affirmance of the judgment, with costs.

CULLEN, Ch. J., HAIGHT and WILLARD BARTLETT, JJ., concur; EDWARD T. BARTLETT and VANN, JJ., dissent upon the ground that the statute means such a mistake as the common law affords relief against, which is a mistake of fact, for even a court of equity gives no relief, unless special circumstances raise a special equity in connection therewith; CHASE, J., not sitting.

Judgment affirmed.

THE HOPEDALE ELECTRIC COMPANY, Appellant, *v.* THE ELECTRIC STORAGE BATTERY COMPANY, Respondent.

SALES — AGREEMENT TO PAY MORE ON FAVORABLE TEST OF ARTICLE — MEASURE OF DAMAGES. Under a contract of sale of an electric plant at a specified price, containing a stipulation that if the vendor's system of storage battery cars, under a test agreed to be made by the vendee and the conditions of which were thereafter to be, and were agreed upon, should equal or prove superior to the system proposed to be operated by the latter, it would pay specified additional sums based upon the

equality or different percentages of superiority, where the vendee refuses to make any test, in the absence of any proof showing that the vendor's system was equal or superior to the other, it is not entitled to the largest or any of the additional sums specified in case of a favorable result of a test, as damages for the breach, but to nominal damages only.

Hopedale Electric Co. v. *Electric Storage Battery Co.*, 96 App. Div. 344, affirmed.

(Argued March 9, 1906; decided March 27, 1906.)

APPEAL from a judgment entered August 1, 1904, upon an order of the Appellate Division of the Supreme Court in the first judicial department, overruling plaintiff's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for the defendant.

The nature of the action and the facts, so far as material, are stated in the opinion.

Austen G. Fox for appellant. The defendant had, at most, an election either to make the stipulated test and thus relieve itself of liability to pay any "further sum" to complete the contract price if the result were favorable to the defendant, or, else, to waive making the test and thus relieve the plaintiff of the burden of proving the condition on which its right to the full contract price was made by the contract to depend. (*Robinson* v. *Hunt*, 88 Hun, 285; *Carlisle* v. *Barnes*, 102 App. Div. 573; *Lawson* v. *Bachmann*, 81 N. Y. 616; *Brown* v. *Foster*, 108 N. Y. 387; *Marsh* v. *Holbrook*, 3 Abb. Ct. App. Dec. 176; *Stewart* v. *Huntington*, 124 N. Y. 127; *Nichols* v. *S. S. Co.*, 137 N. Y. 471; *W. H. Co.* v. *Mansfield*, 48 Vt. 378; *T. H. El. Co.* v. *B. S. El. Co.*, 31 Fed. Rep. 535; *Baldwin* v. *Bennett*, 4 Cal. 392.) There was, in any event, a question for the jury whether, if the test had been made, it would not have produced one of the results which the parties had named in the contract. (*Cahoon* v. *Coe*, 52 N. H. 518; *Bailey* v. *Shaw*, 24 N. H. 297; *Clark* v. *Miller*, 4 Wend. 628; *Lea* v. *Gates*, 10 Ind. 164; *Clifton* v. *U. S.*, 4 How. [U. S.] 242;

Joannes v. *Bennett*, 5 Allen, 169, 172; *Blade* v. *Nolan*, 12 Wend. 173.)

William H. Page, Jr., and *Gilbert H. Crawford* for respondent. The contract sued upon, so far as it had not been executed, was an incomplete agreement, and, therefore, unenforceable. (*United Press* v. *N. Y. P. Co.*, 164 N. Y. 406; *Mayer* v. *McCreery*, 119 N. Y. 434; *McIntosh* v. *Miner*, 37 App. Div. 483; *Nicholls* v. *Granger*, 7 App. Div. 113; *Brown* v. *N. Y. C. R. R. Co.*, 44 N. Y. 79; *Sourwine* v. *Truscott*, 17 Hun, 432, 433; *Reynolds* v. *Miller*, 79 Hun, 113; *Flaherty* v. *Cary*, 62 App. Div. 116.) Even if a breach of contract had been shown, the plaintiff, since no evidence whatever of damage was offered, would have been entitled to only a nominal verdict, and the dismissal of the complaint should not be disturbed. (*United Press* v. *N. Y. P. Co.*, 164 N. Y. 406; *Humaston* v. *Tel. Co.*, 20 Wall. 20; *Bernstein* v. *Meech*, 130 N. Y. 354; *Vanderslice* v. *Newton*, 4 N. Y. 130; *Jutte* v. *Hughes*, 67 N. Y. 267; *Kraft* v. *Rice*, 45 App. Div. 569; *McConihe* v. *N. Y. & E. R. R. Co.*, 20 N. Y. 495; *N. C. R. R. Co.* v. *Schmidt*, 48 App. Div. 472; *Stephens* v. *Wilder*, 32 N. Y. 351.)

WILLARD BARTLETT, J. This action is brought by the Hopedale Electric Company against the Electric Storage Battery Company to recover $500,000 for a breach of the following contract:

"Memorandum of agreement, made this eighteenth day of September, 1895, between the Hopedale Electric Company, a corporation established under and by virtue of the Laws of West Virginia, and the Electric Storage Battery Company, a corporation established under and by virtue of the Laws of the State of New Jersey, Witnesseth: That the said Hopedale Electric Company agrees to sell, and the said Electric Storage Battery Company agrees to buy the letters patent, a list of which is hereunto annexed; also the land and buildings belonging to the Hopedale Electric Company, situate in the town of Milford, in the State of Massachusetts,

together with the cars, tools and machinery and personal property therein, a schedule of which is hereto annexed, and as part of the consideration of this agreement, the said Hopedale Electric Company agrees that a decree may be entered in favor of the complainants in the suit of the Brush Electric Company et al. vs. The Milford and Hopedale Street Railway Co. et al., now pending in the Circuit Court of the United States for the District of Massachusetts, but without damages or costs against the defendants;

"And the said Electric Storage Battery Company agrees that upon tender of conveyance of the property hereinbefore referred to, within thirty (30) days from date, it will pay to the Hopedale Electric Company the sum of one hundred and fifty thousand ($150,000) dollars in manner following: Twenty-five thousand ($25,000) dollars on delivery of conveyances of said property, twenty-five thousand ($25,000) dollars on January 15th, 1896, one hundred thousand ($100,000) dollars on January 15th, 1897, said last two payments of twenty-five thousand ($25,000) dollars; and one hundred thousand ($100,000) dollars respectively to be secured by notes of the said The Electric Storage Battery Company of even date herewith, bearing interest at the rate of six per cent. per annum, payable semi-annually.

"And Whereas the said Hopedale Electric Company claims that the system of storage battery cars, as operated by it at Milford, is equal to and superior to the system controlled by and proposed to be operated by the Electric Storage Battery Company; the said Electric Storage Battery Company agrees that if upon a competitive test of the two systems that of the Hopedale Electric Company is equal to that of the Electric Storage Battery Company it will pay to the Hopedale Electric Company a further sum of One hundred thousand ($100,000) dollars; if five per cent. superior, the sum of one hundred and fifty thousand ($150,000) dollars; if ten per cent. superior, the sum of three hundred thousand ($300,000) dollars; if twenty per cent. superior, the sum of Five hundred thousand ($500,000) dollars.

"The Electric Storage Battery Company agrees that it will proceed forthwith to institute this competitive test.

"The cars and batteries to be operated under the system of the Hopedale Electric Company shall be prepared by and be operated under the management and control of agents selected or approved by it.

"The conditions of the test, such as time, place, track, length of operation, number of cars to be used, etc., under which the test shall be made, shall be agreed upon by both parties as soon as may be after the execution of this instrument, it being understood that the test of superiority shall be determined by the durability, efficiency, economy, speed and reliability of service.

"In witness whereof the said corporations have caused these presents to be signed and their seals hereto affixed by their presidents respectively thereunto legally authorized.

"HOPEDALE ELECTRIC COMPANY.
"By WM. S. HALL, *Pres.* [SEAL.]
"THE ELECTRIC STORAGE BATTERY COMPANY.
"By W. W. GIBBS, *Pres.* [SEAL.]"

No question arises as to the first part of the contract relative to the transfer of the letters patent, the land and buildings at Milford, Mass., and the cars, tools, machinery and other personal property mentioned in the schedule, or in reference to the disposition of the law suit in the Federal court in Massachusetts. It appears that the vendor did all that it was required to do under this portion of the agreement and that the vendee paid the $150,000 thereby required to be paid. The plaintiff, however, charges a breach of the latter part of the contract in two respects: (1) That the defendant neglected to institute any competitive test as therein provided for and refused to make any such test or in any manner to carry out the contract in that respect; and (2) that in addition to said refusal the defendant has by other acts rendered the performance of the competitive test impossible.

The proof on the trial established the refusal of the defend-

ant to make the agreed test, but no evidence was introduced as to the resultant damages sustained by the plaintiff whose learned counsel insisted, as he now insists, that the defendant's breach made it liable for the largest sum stipulated in the contract as that which should be paid in the event of the most favorable result of the test. The trial judge declined to adopt this view and dismissed the complaint.

The respondent contends that the contract sued upon, in so far as it has not been executed, was an incomplete agreement and, therefore, unenforceable. The Appellate Division, however, held that the evidence sufficed to establish that the parties entered into a further agreement as to the terms of the test (left indefinite in the original contract itself) thus rendering the contract capable of enforcement, and I shall make the same assumption here. The case thus resolves itself into the question whether the plaintiff's measure of damages for this breach of the contract is any one of the four several sums mentioned therein as payable by the defendant in the event of certain specified results of the test (so that it was unnecessary to introduce any evidence on the subject of damages except the contract itself) or, whether, in order to be entitled to more than nominal damages, the plaintiff was not bound to prove some actual loss in consequence of the breach.

The payments provided for as conditional upon the comparative test of the two electric storage battery systems were declared by the Appellate Division not to be a part of the purchase price of the property sold, inasmuch as the title to all of such property had passed upon the payment of the $150,000, and the right to further compensation depended upon the existence of conditions thereafter to be ascertained. However this may be, I agree that this is not a case in which the purchase price furnishes the measure of damages. In most instances where a sale is made subject to a test of the article sold after it reaches the hands of the buyer, the test is a privilege or right reserved to the buyer to reject the goods or have a reduction of the price if the goods fail to stand the prescribed test, and so, when he neglects or refuses to make

the test, he thereby evinces his willingness to pay the stipulated purchase price and is held liable therefor. In the case at bar, however, the test, although to be made by the buyer, was not for its benefit, but only to determine whether it should pay *more* than it had already paid for the transfer of title to the property which was the subject of the sale. The promise of increased payment was made dependent upon the ascertainment of additional value. In *Waters Heater Co.* v. *Mansfield* (48 Vt. 378) the defendants ordered of the plaintiff a heater at a specified price and received the same with the privilege of returning it within thirty days if it did not work satisfactorily after being used for that length of time. The defendants did not try the heater at all, and a recovery was sustained for the amount of the purchase price specified in the contract. The case of *Thomson-Houston Elec. Co.* v. *Brush-Swan Elec. L. & P. Co.* (31 Fed. Rep. 535) involved a similar contract for the purchase of electrical machinery and material on trial and the same rule of law was applied, the court saying: "The defendant could make the trial or not as it chose, but if it would order the goods for trial, and not make the trial, it would become liable as if they had been ordered without providing for the trial." Such a transaction is very different from that contemplated by the contract herein where the vendee substantially says to the vendor: "I do not believe that certain of the property which you have sold me is equal or superior to some which I already possess, but if it turns out to be so I will pay you an additional sum of money." The fact that the vendee under such circumstances fails to test the alleged equality or superiority, although he has agreed to do so, undoubtedly renders him liable in damages if the alleged equality or superiority be shown to exist; but I do not think the cases cited can be regarded as authority for the proposition that his damages are measured by the sums specified in the contract, without any proof that the property sold complied with the conditions.

It is argued, however, that the defendant had made it impossible for the plaintiff to ascertain its damages, if any

there were, and hence that the transaction is brought within the principle of *Mackay* v. *Dick* (L. R. [6 App. Cas.] 251) and similar cases holding that where under a contract of sale and delivery which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the contract is to be taken as satisfied if the buyer prevents the possibility of the fulfillment of the condition by the seller. As to this point, it is sufficient to say that I do not think the proof establishes the fact that the defendant had rendered it impossible for the plaintiff to show whether it had actually sustained any damages, and if so, in what amount. The plaintiff could have supplied evidence on this branch of the case either by reconstructing the requisite appliances therefor, under the guidance of the patents for the two storage systems which were to be compared and then making the test itself; or it would have been competent, I think, to state the characteristic features of the rival systems to experts in electrical construction and the operation of electric cars and thus qualify them to give opinion evidence as to the merits of each.

The case, so far as the character of the contract and the measure of damages is concerned, is very much like *Humaston* v. *Telegraph Co.* (20 Wall. 20). The contract there under consideration was between a corporation engaged in the transmission of intelligence by telegraph and an inventor who had just patented a system of telegraphy which he claimed would do five times as much business on one wire as the ordinary systems then in use. Mr. Justice DAVIS thus summarized the agreement: "The company said to Humaston, we will take your patents, whether valid or not, and pay you $5,000 for them, if you and Lefferts stipulate not to compete with us for a period of ten years, and if they are valid, whether useful or not, the compensation shall be increased to $10,000. But we cannot promise additional compensation unless, after proper experiment, your system shall be proved to be worth more. It may be that your claim of rapid performance can be sustained, and yet the system, owing to its greater cost

than those now in use, or some other controlling consideration, be of comparatively little value to us. This can only be determined after trial by some impartial tribunal. We are willing that this tribunal shall be referees, mutually selected, to whom shall be submitted the question of whether we shall pay you anything more than the $10,000 already paid, after the merits of your system have been tested by them and its capability and value established. They may reach the conclusion that you are sufficiently compensated already, and if they do, their award must be accepted as a final settlement of the matters of difference between us. If they reach a contrary conclusion, they must fix the amount of consideration which we are to pay in addition to what you have already received; but this must be within the limit of 400 shares of stock equivalent to $40,000."

After the arbitration proceedings had begun, under this contract, the telegraph company refused to go on before the arbitrators and withdrew its submission. According to the theory of the learned counsel for the appellant in the case before us, Humaston, upon the breach by the telegraph company of its agreement to arbitrate, would have become entitled to recover $40,000, being the largest sum which he could receive upon the most favorable decision of the arbitrators — and this without any further proof of damage than the mere breach of the agreement. The Supreme Court of the United States, however, did not so hold. It declared that nothing was due on the contract unless the trial court and jury, sitting in the place of the arbitrators, should decide that Humaston was entitled to recover for his inventions more than he had already received. In other words, the performance of a condition for valuation having been prevented by the act of the vendee, the price of the thing sold was to be fixed by the jury on a *quantum valebat.*

I have quoted from this *Humaston* case and discussed it thus fully because it seems to me analogous in all essentials to the case at bar, and I think the rule approved therein furnishes the true measure of damages applicable to the plain-

tiff's claim. If so, the courts below correctly held that his proof established only a right to recover nominal damages and properly refused to interfere with the nonsuit simply to permit such recovery.

I, therefore, advise an affirmance of this judgment, with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN and HISCOCK, JJ., concur; WERNER, J., absent.

Judgment affirmed.

MARGARET A. O'DONAGHUE et al., Appellants, *v.* ANNIE A. SMITH et al., Respondents.

1. WILL — CONSTRUCTION OF CLAUSES CREATING TRUSTS FOR BENEFIT OF CHILDREN — WHEN POWER TO PARTITION AND ALLOT REAL ESTATE, GIVEN TO TRUSTEE, INVOLVES POWER TO SELL. Where a testator, after bequeathing an annuity and several legacies, charging them upon his realty if the personalty should be insufficient, gave the rest of his estate, real and personal, to his executors in trust, directing them to sell the realty and convert it into personalty, and to divide the net estate into eight equal shares and pay the income of one thereof to each of his eight children during minority, and upon each child attaining majority to pay over to such child his or her share, and further provided that whenever any child should attain lawful age or die under lawful age, to make partition of his real estate and allot and set apart to each child attaining lawful age, or to the heirs of a child dying under lawful age, his or her share of the real estate; and by a subsequent codicil testator revoked the provision authorizing the sale of all his real estate and directed his executors to sell three parcels only, and use the proceeds thereof to pay the mortgages on the remainder, expressly stating that he did not intend to alter the beneficial interests of his children in the land or the trusts established for their benefit, but ratifying and confirming the same, so that the executors still had the power to make partition of the real estate and allot the same among the testator's children or their heirs, as originally provided, such power to partition necessarily carries with it the power to sell, where the real estate is so situated that actual partition cannot be had, and the power given to the executors devolves upon the court if, for any reason, they are disqualified or refuse to act.

2. SAME — ACTION TO PARTITION AND SELL REAL ESTATE AFTER SOME OF THE CESTUI QUE TRUSTENT HAVE BECOME OF AGE — POWER OF COURT — WHEN JUDGMENT THEREIN IS RES ADJUDICATA AGAINST PARTIES THERETO. Where an action for the partition and sale of testator's real estate was instituted ten years after his death by the

eldest of his children who was also one of his executors, one of the other children having died and four of them having become of age and desiring their shares of the estates paid over to them, and the trust, as to them, terminated, such children and the widow being made parties to the action, the infant defendants appearing by their guardians *ad litem*, who put in the usual answer submitting their rights and interests to the protection of the court, the judgment of partition and sale rendered in such action is *res adjudicata* and a bar to an action of ejectment afterward brought by such infant defendants to recover their proportionate shares of testator's real estate, since the court was required to examine the provisions of testator's will and determine whether or not a sale of his real estate was prohibited or longer postponed, and having determined those questions in the negative, it had the power to order judgment in accordance therewith; if the court erred in such determination the error could have been corrected by an appeal, but when this was not done, such judgment became final and conclusive upon the parties, and cannot, in the absence of fraud, be questioned collaterally.

3. SAME — WHEN JUDGMENT OF SALE IN SUCH ACTION OF PARTITION IS NOT IN CONTRAVENTION OF PROVISIONS OF WILL. The contention, that the judgment of sale in such action of partition is void because it violates the provisions of the statute prohibiting the sale of the real estate of infants in contravention of a will or deed under which their estate is created, is untenable, since the statute has no application where there are adult tenants in common who have an immediate right to the possession of their share; if all the tenants in common derive their estate through the same will or deed, and if, under the instrument, when one becomes of age he is entitled to have his share, he may maintain partition and have a sale, if necessary, for it no longer would be in contravention of the instrument, but in accordance with its provisions, giving to him the immediate right to possess his share.

4. SAME — SERVICE OF SUMMONS ON INFANT RESIDING OUT OF THE STATE — WHEN REGULAR UNDER THE STATUTE IN FORCE IN 1869 (CODE PRO. § 448 AND 2 R. S. PART 3, CH. 5, TIT. 3, § 12). Where the statutes relating to actions in partition in force in 1869 (Code Pro. § 448, and 2 R. S. part 3, ch. 5, tit. 3, § 12) provided that if any of the parties were unknown or if either of the known parties were minors or of full age residing out of the state, service could be made by publication, or instead thereof, with respect to any known absent party, the petition and notice (under the Code, summons and complaint) might be served personally out of this state, forty days previous to its presentation, without publishing the same, the due and timely service of the summons in an action of partition commenced in 1869 upon an infant defendant and on the person with whom such infant was temporarily residing out of the state, was regular and gave the court jurisdiction of such infant, especially where her mother, with whom she resided when at home within this state,

thereafter petitioned, as the next friend of such infant, to be appointed her guardian *ad litem*, and was regularly appointed such guardian and appeared in the action by an attorney who interposed the usual answer submitting the rights and interests of such infant to the protection of the court; the fact that the original affidavit of the service of the summons was defective by reason of the omission of the jurat of the commissioner of deeds before whom it was taken is immaterial where it was subsequently cured by another affidavit which, under an order of the court, was filed *nunc pro tunc* as of the date of the first affidavit.

O'Donoghue v. *Smith*, 85 App. Div. 324, affirmed.

(Argued March 14, 1906; decided March 27, 1906.)

APPEAL by Margaret A. O'Donaghue from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 22, 1903, reversing a judgment in her favor entered upon a verdict directed by the court and granting a new trial.

Appeal by William O'Donaghue and James O'Donaghue from a judgment of said Appellate Division, entered October 22, 1903, affirming a judgment entered upon a dismissal of the complaint as to them by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Benjamin F. Tracy and *Frederick A. Card* for appellants. The sale in the partition suit was void as to plaintiffs, and defendants derived no title therefrom. (*Hughes* v. *Cummings*, 165 N. Y. 91; *Matter of Leggat*, 162 N. Y. 437; *Hovey* v. *Elliott*, 145 N. Y. 126; *People ex rel. Tweed* v. *Liscomb*, 60 N. Y. 559; Herman on Estoppel, 373; *Matter of Lange*, 18 Wall. 163; *Bigelow* v. *Forest*, 9 Wall. 339; *United States* v. *Walker*, 109 U. S. 258; *Windsor* v. *McVeigh*, 93 U. S. 274; *Risley* v. *Phœnix Bank*, 83 N. Y. 318.) Defendants' plea of *res adjudicata* is not sustained by the proof. (Kuhn Chand on Res Adjudicata, 397, § 167; Black on Judgments, § 218; *Elliott* v. *Perssal*, 1 Pet. 340; *Seed* v. *Johnston*, 63 App. Div. 340; *Reynolds* v. *A. Ins. Co.*, 160 N. Y. 635; *Rudd* v. *Cornell*, 58 App. Div. 207; 171 N. Y.

114; *Stokes* v. *Foote*, 172 N. Y. 327; *C. Co.* v. *Beckwith*, 167 N. Y. 329; Freeman on Judgments [4th ed.], 441, 442, § 249; *Burdick* v. *Post*, 12 Barb. 168; *Campbell* v. *Consalus*, 25 N. Y. 613; *Fairweather* v. *Busling*, 181 N. Y. 117; *W., etc., Co.* v. *Sickles*, 5 Wall. 580; *Russell* v. *Place*, 94 U. S. 606.) Even if the partition judgment be not held void *in toto* it was void as to Margaret because no jurisdiction of her person was acquired therein. (*Ladow* v. *Groom*, 1 Den. 429; *Darrow* v. *Calkins*, 154 N. Y. 503; *N. Y. Ins. Co.* v. *Bangs*, 103 U. S. 435; *Uhl* v. *Langhorn*, 14 Civ. Pro. Rep. 344; *Kendall* v. *Washburn*, 14 How. Pr. 380; *Guarantee Co.* v. *Philadelphia Co.*, 160 N. Y. 1; *Pinckney* v. *Smith*, 26 Hun, 524; *Hoyle* v. *Hoyle*, 49 Hun, 313; *Taylor* v. *Lynne*, 162 N. Y. 513; *Dutton* v. *Smith*, 10 App. Div. 566; *Needham* v. *Thayer*, 147 Mass. 536.) The will and the statute forbade a sale of the infants' lands in the partition action. (*Matter of Green*, 153 N. Y. 223; *Williams* v. *Jones*, 166 N. Y. 522; *Young* v. *Langbien*, 7 Hun, 151; *Taylor* v. *Grange*, 43 L. T. [N. S.] 233; *Van Brunt* v. *Van Brunt*, 111 N. Y. 178; *Vanderpoel* v. *Loew*, 112 N. Y. 167; *Stevenson* v. *Leslie*, 70 N. Y. 512; *Gilman* v. *Reddington*, 24 N. Y. 9; *Bliven* v. *Seymour*, 88 N. Y. 469; *Durfee* v. *Pomeroy*, 154 N. Y. 583.)

H. Aplington for respondent. The judgment in partition is a bar to the plaintiff's action. (*Maples* v. *Mackey*, 89 N. Y. 146; *Bosworth* v. *Vandewalker*, 53 N. Y. 597; *Schaettler* v. *Gardiner*, 47 N. Y. 404; *Patrick* v. *Shaffer*, 94 N. Y. 423; *Leavitt* v. *Wolcott*, 95 N. Y. 212; *Brevoort* v. *Brevoort*, 70 N. Y. 136; *Howell* v. *Mills*, 56 N. Y. 226; *Reed* v. *Reed*, 107 N. Y. 545; *Woodhull* v. *Little*, 102 N. Y. 165; *Hunt* v. *Hunt*, 72 N. Y. 217; *Jordan* v. *Van Epps*, 85 N. Y. 434.) The contention that the court had no jurisdiction of the person of Margaret Ann O'Donaghue in the partition action cannot be sustained. (*Ingersoll* v. *Mangam*, 84 N. Y. 622; *Croghan* v. *Livingston*, 17 N. Y. 218; *Livingston* v. *Livingston*, 56 App. Div. 484; *Parish* v. *Parish*, 175 N. Y. 181.)

Frank W. Hackett for Smithsonian Institution, intervening. The court in the partition suit had complete jurisdiction. Its decree was valid, even had the O'Donaghue will forbidden a sale. (*Muller* v. *Struppeman*, 6 Abb. [N. C.] 348; *Rogers* v. *Dill*, 6 Hill, 415.) The judgment in partition is conclusive, and cannot be collaterally attacked. (*Blakeley* v. *Calder*, 15 N. Y. 61; *Gallatian* v. *Cunningham*, 8 Cow. 361; *Howell* v. *Mills*, 56 N. Y. 229; *Horton* v. *McCoy*, 47 N. Y. 21; *Livingston* v. *Livingston*, 56 App. Div. 484; 166 N. Y. 601; *Hughes* v. *Cumming*, 165 N. Y. 91; *Corbin* v. *Baker*, 167 N. Y. 128; *Parish* v. *Parish*, 175 N. Y. 180.) The court had jurisdiction of the person of the infant Margaret O'Donaghue. (*Ferguson* v. *Crawford*, 86 N. Y. 611; *Bosworth* v. *Vandewalker*, 53 N. Y. 597; *Phillips* v. *Gorham*, 17 N. Y. 270; *Washbon* v. *Cope*, 144 N. Y. 287; *O'Conner* v. *Felix*, 87 Hun, 179.)

HAIGHT, J. This is an action of ejectment brought by the plaintiffs to recover three-sevenths of the property described in the complaint, each claiming to be the owner of an undivided one-seventh thereof.

Michael O'Donaghue died in the city of New York on the 8th day of April, 1860, seized and possessed of the property in question, leaving a last will and testament with three codicils, all of which were duly admitted to probate in the county of New York. He left him surviving a widow, and the plaintiffs and five other children, one of whom subsequently died.

In September, 1869, an action was commenced by John T. O'Donaghue, one of the children of the testator, for a partition of the real property of which his father died seized, making his mother, the widow of such testator, as executrix and individually, a party defendant together with his brothers and sisters, including the plaintiffs, who were then infants. In that action the plaintiffs in this action appeared by their guardians *ad litem*, who interposed the usual answer submitting their interests to the care of the court. This action

resulted in a judgment for a sale of the premises, upon the ground that they were so situated that actual partition could not be had; and upon such sale they were struck off to Thomas G. Hodgkins, who subsequently, in May, 1871, conveyed the same to Edward Smith, who subsequently died, leaving a last will and testament, devising the same to the defendants herein. The plaintiffs contend that the sale of the premises under the partition judgment was in violation of the provisions of the statute, to the effect that no real estate, or term for years, shall be sold, leased or disposed of in any manner against the provisions of any last will, or of any conveyance, by which such estate or term was devised or granted to such infants. (2 R. S. 195, § 176.) This contention is controverted by the defendants, who, among other defenses, set up that the judgment in the partition action is *res adjudicata* and a bar to the rights of the plaintiffs to recover in this action.

The will of Michael O'Donaghue contains provisions for an annuity to be given to his widow during life, bequeaths a number of legacies to other persons, which are made a charge upon his real estate in case the personalty should prove insufficient, and then by the eighth clause he provides as follows: "I give, devise and bequeath to my executors all the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and wheresoever situate upon the trusts nevertheless and for the purposes and intents and with the powers following, that is to say: Upon trusts to sell all my real estate or any part thereof at such time or times and upon such terms at public or private sale, for cash or upon credit, with security by mortgage as to my executors shall seem prudent, it being my intention that my real estate shall be deemed converted into personalty from the time of my decease, and to pay all expenses of such sale and all mortgages and encumbrances on my real estate, and to invest my personal estate and the proceeds of my real estate or so much thereof as shall remain after satisfying the mortgages and encumbrances thereon on bond and mortgage or in the public stocks of the United States or of the State of New York, or of the City of

New York, and to receive the rents and profits of my real estate until the same shall be sold, and also to receive the interest, dividends and income of my personal estate and of the proceeds of my real estate, and to divide my said personal estate and the proceeds of my real estate into eight equal shares, and to apply the interest, issues and income thereof severally to the use of my eight children, one share for each, during his or her minority; and upon each of my said children attaining lawful age, to pay over to such child his or her share of my said estate."

He then provides for the disposition of the share of any child who should die before attaining majority, and by the ninth clause provides: "I further authorize and empower my executors whenever any of my children shall attain lawful age or die under lawful age to make partition of my real estate and to allot and set apart to such child so attaining lawful age or to his or her descendants or surviving brothers and sisters or their descendants if such child die under lawful age his or her equal share of my estate."

By a codicil dated the 23d day of January, 1860, he provided: "Whereas, by my said will I have directed the sale of all my real estate in the City of New York. I now revoke said direction and authorize my executors to sell only my lands and premises known as Number one hundred and twenty Broome Street front and rear, number Ninety-one Cherry Street and Number one hundred and Ninety-one Elm Street, all in the City of New York, the proceeds of which sales shall be applied to the payment of mortgages on my other real estate. I do not intend by this change to alter the beneficial interest in said lands or the trusts and devises contained in the eighth clause of my said will, but design that the said lands not sold and the income thereof shall be held by my executors under the same trusts, provided in said clause in relation to the proceeds, of said lands, in case of sale." And then, after inserting some provisions not material to the question under consideration, he finally concludes with these words: "In all other respects I ratify and confirm my said will."

The other codicils pertain to the appointment of executors, and do not require consideration.

It will be observed that, by the provisions of the will, it was the intention of the testator to convert into personalty all of his real estate and that the power of sale given to the executors was for this purpose. It was this imperative power that he revoked by his codicil, except as to the three parcels therein specifically described, and as to those he continued the imperative power to sell and to apply the proceeds in the payment of the mortgages upon the other real estate owned by him. But in revoking the power to sell the whole, and limiting it to the three parcels specified, he expressly states that he does not intend to alter the beneficial interests of his children in the land or the trust contained in the eighth clause of his will, but in express terms he ratifies and confirms the same. We, therefore, have the trust provided for by the will remaining undisturbed by the codicil, and by it the personal estate and the proceeds of the real estate are divided into eight equal shares, being the number of children that he then had living, with explicit directions to apply the interest, issue and income thereof severally to the use of such children, one share for each during his or her minority, and then upon each child attaining lawful age, to pay over to such child his or her equal share of his said estate, and then, in order to enable the executors to carry out his will, with reference to paying over to each child, as he or she attains lawful age, he further expressly provides that they may make partition of his real estate and allot and set apart to each child or to his or her descendants the share of the trust estate designed for such child.

The will contains no other limitation of the power to sell.

The testator died seized of a large quantity of real estate. It is said that there were sixteen parcels in the city of New York and some elsewhere. Apparently, he had little personal estate and, therefore, charged the legacies given by his will upon the real estate. Some of his real estate was incumbered with mortgages and, therefore, he found it necessary, in order to pay up the mortgages, to imperatively require

the sale of certain of his real estate. It is, thus, apparent that, in providing for the payment over to a child on his arriving at his majority of his share of the estate, he contemplated the payment to be made out of the real estate or the proceeds thereof. The trust created, as we have seen, is several, for the benefit of each child and terminates as to each child when it arrives at age.

It is contended that, by the codicil, the testator only intended to revoke the *imperative* power of sale, leaving with the executors a discretionary power to be exercised when necessity required; however that may be, we shall assume for the purposes of this case that the power of sale given to the executors by the eighth clause of the will, whether imperative or discretionary, was absolutely revoked. What then was the situation? All of the testator's children were minors. The trust created included the real estate without a power of sale, which continued until one of his children became of age, at which time the trust terminated as to such child and the executors were required to pay over to such child its share; and on the happening of that event the testator, doubtless for the purpose of enabling the executors to perform his requirement in that regard, authorized them to make partition of his real estate. The power to partition necessarily carries with it the power to sell where the real estate is so situated that actual partition cannot be had, and the power given to the executors to partition devolves upon the court if, for any reason, they are disqualified, unable or refuse to act.

The partition action, to which we have alluded, was not brought until ten years after the testator's death. At that time four of his children had become of lawful age and one had died. The four adult children were entitled to have their shares of the estate paid over to them and the trust, as to them, terminated. The executors, at that time, consisted of only the widow and the testator's eldest son, who was a party interested and entitled to his one-seventh share of the trust estate. The widow had not seen fit to move in the matter. The adults naturally wanted their estate. It was under these

circumstances that John T. O'Donaghue, one of the executors, instituted the action, bringing all of the interested parties before the court. It appears to us that the action was not only authorized, but at that time there was no provision in the will that further postponed the power of sale.

Was the partition judgment *res adjudicata* and a bar? We think it was. We shall not attempt to review the discussion of this question which took place in the case of *O'Donoghue* v. *Boies* (159 N. Y. 87) or allude to the authorities there considered, for, assuming the rule to be as claimed by the appellants, that the court must not only acquire jurisdiction of the parties and of the subject-matter, but in partition cases must also have statutory authority to award the judgment entered, the question still remains for determination as to whether the court did have such jurisdiction and power. That the court did acquire jurisdiction of the parties and of the subject-matter is not questioned, except as to the infant Margaret Ann, whose case we shall consider farther on. But it is contended that the court had no jurisdiction to order a sale of the real estate in contravention of the provisions of the last will and testament by which the estate was created. That depends upon the provisions of the will and the interpretation that should be given to it. The statute has authorized the court to sell when the real estate is so situated that partition cannot be had. All of these plaintiffs were infant defendants in that action and appeared by their guardian *ad litem* who put in the usual answer submitting their rights and interests in the premises to the protection of the court. The duty then devolved upon the court of not only determining the nature and character of their estates, but also of protecting their interests therein. The court was required to ascertain the facts from the provisions of the will and determine whether or not a sale was prohibited or longer postponed, and having determined these questions it had the power to order judgment in accordance therewith. It was like an issue triable in the case, and if the court erred in the determination of the questions the error could be corrected by an appeal, but other-

wise the judgment entered became final and conclusive upon the parties and cannot, in the absence of fraud, be questioned collaterally.

There is still another answer to the appellants' contention herein, and that is, that the provisions of the statute prohibiting the sale of the real estate of infants in contravention of a will or deed under which their estate is created, has no application where there are adult tenants in common who have an immediate right to the possession of their share. A tenant in common cannot, by his deed or will, impair or postpone the rights of his co-tenants to have and fully enjoy their shares of the real estate. He cannot, by a devise or grant to his children, or other persons, postpone the power of alienation during two lives or for any other period and thereby prevent a partition or a sale, where the property is so situated that the court would be required to order a sale, and thus prevent his co-tenants from having the remedy given them by the statute. If all the tenants in common derive their estate through the same will or deed, and if, under the instrument, when one becomes of age he is entitled to have his share, he may maintain partition and have a sale, if necessary, for it no longer would be in contravention of the instrument, but in accordance with its provision, giving to him the immediate right to possess his share. It is only where the tenants in common derive their estate through a deed or will, where all are infants or in which the right of division and possession of the adult, as well as the infant, tenants in common are postponed until the happening of a specified event, that the statute applies.

It is true that, under the provisions of the law of 1785 (Ch. 39), it is provided that no division or sale shall be made contrary to the intention of any testator, as expressed in his last will and testament. But, upon the revision of the statutes in 1813, the prohibition referred to was eliminated from the chapter on partition and inserted in the statute authorizing a sale of lands of infants. (2 R. S. 195, § 176; 2 R. S. 315.) And so it remains under the Code. (Code Civ. Pro.

§§ 1564, 2357.) Under the Revised Statutes no one but adults could institute an action for partition. Infants, therefore, could not, through their guardian, institute an action and thus evade the prohibited provision, as was attempted in the case of *Muller* v. *Struppman* (6 Abb. N. C. 343).

We are aware that the legislature, in recent years, have given the infants the right to institute partition, upon first obtaining leave of the court showing that they will be benefited thereby; but this leave should only be granted in a clear case upon showing a necessity therefor, and in cases where the prohibition of the statute does not apply.

The appeal taken by Margaret Ann O'Donoghue brings up for review the question as to whether the court in the partition action obtained jurisdiction, so far as she was concerned. She was, at that time, an infant under fourteen years of age. The affidavit, attached to the judgment roll, of Alice V. Leavitt is to the effect that on the 5th day of October, 1869, she served the summons upon the defendant Margaret Ann O'Donaghue and on Mother Borgie, with whom the said Margaret resided, by delivering to each of them a copy of said summons and at the same time showing to each of them the original; that the service was made at the Academy of Visitation, where they resided, and that she was acquainted with the defendant Margaret and knew her to be one of the defendants.

It will be observed that the proof of service does not show where the service was made further than that at the Academy of Visitation. Where the academy was located does not appear in the record of that action. Upon the trial of this action, however, evidence was given tending to show that it was located in the state of Virginia. We will assume, therefore, that the summons was served personally in that state. After such service it appears from the judgment roll in the partition action that the mother of Margaret Ann, with whom she lived when not away attending school, as her next friend, petitioned the court for the appointment of a guardian *ad litem* to protect her interests in the partition action. There-

upon she was appointed such guardian and gave the bond required by the statute, and then retained one Benjamin C. Wetmore, an attorney, who appeared in the action for Margaret Ann, and interposed an answer in which he submitted her rights and interests in the premises to the protection of the court. Under the provisions of section 448 of the Code of Procedure then in force it was provided that the provisions of the Revised Statutes relating to the partition of lands held by joint tenants or tenants in common shall apply to actions for such partition brought under the provisions of the Code, so far as the same can be so applied to the substance and subject-matter of the action without regard to its form. Under the Revised Statutes the action was commenced by a petition and notice but under the Code a summons and complaint were substituted in place of the petition and notice. The Revised Statutes then in force pertaining to partition provided that if any of the parties are unknown, or if either of the known parties were minors or of full age residing out of the state service could be made by publication, or "instead thereof, with respect to *any* known absent party such petition and notice may be served personally, out of this state, forty days previous to its presentation without publishing the same." (2 R. S. part 3. ch. 5, tit. 3, § 12.) Of course, the provisions of the Revised Statutes are only applicable in so far as they remain unaffected by the provisions of the Code. If the provision with reference to the service of known infant parties outside of the state is in conflict with the provisions of the Code with reference to the service of summons in partition actions, then that provision is no longer applicable, but our attention has been called to no provision of the Code then in force which prohibited such service. We, therefore, conclude that the summons and complaint having taken the place of the petition and notice, the service was regular, and that it gave the court jurisdiction. (*Gotendorf* v. *Goldschmidt*, 83 N. Y. 110; *Ingersoll* v. *Mangam*, 84 N. Y. 622.)

In the latter case ANDREWS, J., in delivering the opinion of the court, says: "Infants are deemed to be wards of the

court, and when brought in by service of process the court will look after and protect their interests. But the court must first acquire jurisdiction before they are bound by its judgment. There is no invariable rule defining what legal proceedings constitute due process of law conferring jurisdiction upon a court to deal with and bind the property of infants. Notice in some form, actual or constructive, is essential, but the legislature may prescribe that such notice shall be given to the parent or guardian or other person as representing the infant, and proceedings in conformity with the statute in such cases will be valid and the infant will be bound. Under the Revised Statutes, in proceedings for partition of lands by petition, jurisdiction over the person and property of infants was acquired by the appointment of a guardian in the first instance upon notice to such infants or to their general guardian. Service of notice upon the infants was not indispensable to the exercise of the jurisdiction. (2 R. S. 317, § 2; *Croghan* v. *Livingston*, 17 N. Y. 218.) The provisions of the Revised Statutes relating to the partition of lands were, by section 448 of the Code of Procedure, made applicable to actions for partition so far as the same could be applied to the substance and subject-matter of the action without regard to form, and in *Gotendorf* v. *Goldschmidt* (83 N. Y. 110) it was held that under the provisions of the Revised Statutes and of the Code in force when that action was commenced, personal service of the summons upon an infant defendant, in an action for partition, was not essential to give the court jurisdiction."

The original affidavit of the service of the summons was defective by reason of the omission of the jurat of the commissioner of deeds before whom it was taken, but this was subsequently cured by another affidavit which, under an order of the court, was filed *nunc pro tunc* as of the 13th day of November, 1869. The provisions of section 116 of the Code of Procedure to the effect that, in an action for partition of real property, when an infant defendant resides out of the state, or is temporarily absent therefrom, the plaintiff may

apply to the court in which the action is pending for an order designating some suitable person to be guardian of the infant defendant for the purposes of the action unless the infant defendant, or some one in his behalf within a number of days specified after the service of a copy of the order, shall procure the appointment of a guardian for the infant, has no application for the reason that the order appointing the guardian in this case was not made on the application of the plaintiff, but by the infant herself, through her mother and next friend.

The judgment, as to appellants William and James O'Donaghue, should be affirmed, and the order of the Appellate Division, as to the appeal of Margaret Ann O'Donaghue, should be affirmed, and judgment absolute ordered against her and in favor of the defendants upon her stipulation, with one bill of costs against all of the appellants.

CULLEN, Ch. J., VANN, WILLARD BARTLETT and CHASE, JJ., concur; GRAY and EDWARD T. BARTLETT, JJ., concur in result.

Judgment accordingly.

RAY JOHNSTON, Respondent, *v.* JAMES C. FARGO, as President of the AMERICAN EXPRESS COMPANY, Appellant.

MASTER AND SERVANT — AGREEMENT RELIEVING EMPLOYER FROM LIABILITY FOR NEGLIGENCE RESULTING IN PERSONAL INJURIES, VOID AS AGAINST PUBLIC POLICY. An agreement relieving an express company from liability to an employee for personal injuries resulting from the negligence of the company, which he may receive in the course of his employment, is void as against public policy, in that its enforcement would nullify the strict and just rule of the common law imposing the duty of care on the part of employers toward employees, which in the interests of the public should be maintained and enforced.

Johnston v. *Fargo*, 98 App. Div. 436, affirmed,

(Argued March 13, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 13, 1904, affirming a judgment of the Onondaga County Court which affirmed a judgment of the Municipal

Court of the city of Syracuse in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Willard A. Glen for appellant. The contract signed by plaintiff releasing the defendant from negligence is a valid one, and the trial court erred in saying to the jury that said contract was void as being without consideration and against public policy. (*Matter of N. Y., L. & W. R. R. Co.*, 98 N. Y. 447; *Bissell* v. *N. Y. C. R. R. Co.*, 25 N. Y. 442; *Cowenhoven* v. *Ball*, 118 N. Y. 231; *Brady* v. *Nally*, 151 N. Y. 258; *Matter of Clark*, 168 N. Y. 427; *H. Ins. Co.* v. *Watson*, 59 N. Y. 390; *Baird* v. *Baird*, 145 N. Y. 659; *Griswold* v. *I. C. R. R. Co.*, 24 L. R. A. 651; *Richardson* v. *Mellish*, 2 Bing. 229; *Michigan Cen. R. R. Co.* v. *Hale*, 6 Mich. 243; *Graves* v. *L. S. & M. S. R. Co.*, 137 Mass. 33.)

Frederick A. Kuntzsch for respondent. The charge of the trial court holding void the release offered in evidence by the defendant was not error. (*Bissell* v. *N. Y. C. R. R. Co.*, 25 N. Y. 442; *Purdy* v. *R., W. & O. R. R. Co.*, 126 N. Y. 209; *Runt* v. *Herring*, 2 Misc. Rep. 105; *Simpson* v. *N. Y. R. Co.*, 80 Hun, 415; *Pratt* v. *L. S. R. R. Co.*, 63 Hun, 616; 136 N. Y. 654; *Perkins* v. *N. Y. C. & H. R. R. R. Co.*, 24 N. Y. 196; *Smith* v. *N. Y. C. & H. R. R. R. Co.*, 24 N. Y. 222; *Bossout* v. *R., W. & O. R. R. Co.*, 32 N. Y. S. R. 884; *Kenney* v. *N. Y. C. & H. R. R. R. Co.*, 125 N. Y. 422; *Will* v. *P. T. Co.*, 3 App. Div. 22.)

GRAY, J. The plaintiff, while in the employment of the American Express Company, the defendant, sustained personal injuries, for which he has recovered this judgment in the Municipal Court of the city of Syracuse; which has been affirmed by the County Court of Onondaga county and by the Appellate Division of the Supreme Court, in the fourth department. The latter court was divided in opinion and has permitted the defendant to further appeal to this court, upon

the ground that there was a question of law in the case, which ought to be reviewed by us. The injuries were occasioned by the plaintiff's falling with an elevator, or lift, in the barn of the express company, while it was being used for carrying down some vehicles, and the complaint charges that it was in a defective condition and that the occurrence was due to the fault, or negligence, of the defendant. The evidence upon the trial was such as to raise questions of fact, as to the negligence of the defendant and as to the contributory negligence of the plaintiff, and those questions were properly submitted by the trial court for the determination of the jury. They demand no further consideration by us. The one question for discussion upon this appeal is the sufficiency of the defense made by the company upon an agreement, which the plaintiff, upon entering the defendant's employment, executed and delivered to it. It was in these words:

"I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company, or any of its members, officers, agents or employees, or otherwise; and that, in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith."

In submitting the case to the jury, the trial judge charged as follows, with respect to this defense: "There is a clause in the contract which provides that the plaintiff shall release the defendant from any injuries which he might suffer by reason of the negligence of the defendant. I shall hold as matter of law that that clause in that contract is void as being without

consideration and as against public policy." At the Appellate Division the judgment was upheld, on this point, upon the ground that the agreement was contrary to public policy and, therefore, invalid, and Mr. Justice HISCOCK, who delivered the opinion of the court, has presented the reasoning in support of that view very fully and ably.

The question is one upon which this court has not pronounced itself and it is of considerable importance; touching as it does the principle of freedom of contract. In the case of *Purdy* v. *R., W. & O. R. R. Co.*, (125 N. Y. 209), such a contract to release the employer from liability for injury through negligence was involved; but it was held to have been void for being without the support of any consideration. It was said that no intimation was intended that it would have been valid, if there had been a consideration for it, and that "it might even then be urged that public policy forbids the exaction of such a contract from its employés by railroad and and other corporations and upon that question we desire to express no opinion at the present time." In *Kenney* v. *N. Y. C. & H. R. R. R. Co.*, (125 N. Y. 422), the contract for exemption from liability was between the defendant and the plaintiff's employer, an express company, under which the former sought to defeat the plaintiff's action. This question was not passed upon; nor was it in the case of *Dowd* v. *N. Y., Ont. & W. Ry. Co.*, (170 N. Y. 459), which involved the proposition of the implied assumption by the employé of the risks incident to the employment.

The question of the validity of such a contract between an employer and a person in his employment, as affected by reasons of public policy, it must be conceded, is a debatable one. In support of the right to make the agreement we have respectable authority in decisions of the courts of England and of the state of Georgia. (*Griffiths* v. *Earl of Dudley*, L. R. [9 Q. B. Div.] 357; *Western, etc., R. R. Co.* v. *Bishop*, 50 Ga. 465; *Same Co.* v. *Strong*, 52 Ga. 461.) The great weight of authority in decisions of the courts of the various states, however, sustains the view that such an agreement is contrary to

public policy. (*L. S. & M. S. Ry. Co.* v. *Spangler*, 44 Ohio St. 471; *K. P. R. Co.* v. *Peavey*, 29 Kan. 169; *M. & C. R. R. Co.* v. *Jones*, 2 Head [Tenn.], 517; *Willis* v. *G. T. R. Co.*, 62 Me. 488; *L. R. & F. S. Ry. Co.* v. *Eubanks*, 48 Ark. 466; *R. & D. R. R. Co.* v. *Jones*, 92 Ala. 218; *Maney* v. *C., B. & Q. R. R. Co.*, 49 Ill. App. 105; *M. N., etc., Co.* v. *Eifert*, 15 Ky. L. R. 575; *Blanton* v. *Dold*, 109 Mo. 64; *Johnson* v. *R. & D. R. R. Co.*, 86 Va. 975.) In the Supreme Court of this state, we find, in addition to what has been held below in this case, a similar view taken by the General Term of the second department in *Simpson* v. *N. Y. Rubber Co.*, (80 Hun, 415). The preponderance of authority adverse to the validity of such contracts is such as greatly and properly influences our view of the question. In *Griffiths* v. *Earl of Dudley*, (*supra*), where such an agreement was held to be quite consistent with public policy, the view of the English court, as expressed by Justice FIELD, was that "the interest of the employed only would be affected" and not that of "all society," and "that workmen, as a rule, were perfectly competent to make reasonable bargains for themselves." It is to be observed, however, with respect to the situation in England, that subsequently, in 1897, an act of Parliament was passed, entitled "The Workingmen's Compensation Act," which, in effect, declares the public policy of the state. By that act, in reality, though not in form, the right of the workingman to contract away his right to recover compensation from his employer is nullified; inasmuch as such a contract is only valid when, as between employer and employed, there exists a general scheme for compensation, which secures to the workingman benefits as great as those he would derive from a proceeding under the Compensation Acts.

The attitude of this court, with respect to the freedom to contract for immunity from the consequences of negligence, has been, from an early day, very firm, where the contracts of common carriers are concerned; as may be seen by reference to *Kenney* v. *N. Y. C. & H. R. R. R. Co.*, (*supra*), where the cases establishing the rule were reviewed; but to extend the application of the doctrine in such cases to the

relations of the employer and the employed involves considerations so closely touching the general welfare of the community, that the state must be, necessarily, deeply concerned. This court has not been in agreement with the Supreme Court of the United States upon the right of common carriers to contract against their negligence; but, recently, in *Baltimore & Ohio So. Ry. Co.* v. *Voigt*, (176 U. S. 498), the doctrine of *New York Central R. R. Co.* v. *Lockwood*, (17 Wall. 357), seems to have been somewhat departed from. As that decision touches, in a degree, upon the question we are considering, I shall, briefly, refer to it. In that case Voight was an express messenger and was injured, as the consequence of a collision upon the railroad. The company showed, in defense of a claim for compensation, a contract made between it and the express company, relating to the latter's business, which agreed to protect it from liability to messengers by reason of accidents occurring through negligence, and a further contract between Voight and the express company, by which he assumed the risk of all accidents from negligence, sustained by him in the course of his employment, and agreed to hold his employer harmless from any claim for personal injuries. It was held that the contract did not contravene public policy. Though the distinction was made that Voight was not a passenger, within the meaning of the *Lockwood Case*, (*supra*), and that his contract exonerated the railroad company from liability to him, it might, perhaps, be said that the decision affords some support, in doctrine, to the appellant's argument.

Contracts are illegal at common law, as being against public policy, when they are such as to injuriously affect, or subvert, the public interests. (1 Story Eq. Juris. § 260n; *Chesterfield* v. *Janssen*, 2 Vesey Sr. 125, 156.) If it were true that the interest of the employed, only, would be affected by such contracts as the present one, as it was held by the English court, in *Griffiths* v. *Earl of Dudley*, (*supra*), it would be difficult to defend, upon sound reasoning, the denial of the right to enter into them; but that is not quite true. The theory of their invalidity is in the importance to the state

that there shall be no relaxation of the rule of law, which imposes the duty of care on the part of the employer towards the employed. The state is interested in the conservation of the lives and of the healthful vigor of its citizens, and if employers could contract away their responsibility at common law, it would tend to encourage on their part laxity of conduct in, if not an indifference to, the maintenance of proper and reasonable safeguards to human life and limb. The rule of responsibility at common law is as just as it is strict and the interest of the state in its maintenance must be assumed; for its policy has, in recent years, been evidenced in the progressive enactment of many laws, which regulate the employment of children and the hours of work, and impose strict conditions with reference to the safety and healthfulness of the surroundings of the employed, in the factory and in the shop. The employer and the employed, in theory, deal upon equal terms; but, practically, that is not always the case. The artisan, or workman, may be driven by need; or he may be ignorant, or of improvident character. It is, therefore, for the interest of the community that there should be no encouragement for any relaxation on the employer's part in his duty of reasonable care for the safety of his employés. That freedom of contract may be said to be affected by the denial of the right to make such agreements, is met by the answer that the restriction is but a salutary one, which organized society exacts for the surer protection of its members. While it is true that the individual may be the one, who, directly, is interested in the making of such a contract, indirectly, the state, being concerned for the welfare of all its members, is interested in the maintenance of the rule of liability and in its enforcement by the courts.

To a certain extent, the internal activities of organized society are subject to the restraining action of the state. This is evidenced by the many laws upon the statute book, in recent years, which have been passed for the purpose of prohibiting, restricting, or regulating, the conduct of a private business; either because regarded as hurtful to the health, or

welfare of the community; or because deemed from its nature, or magnitude, affected with a public interest. It has been observed that it is still the business of the state, in modern times, to defend individuals against one another and, though the proposition is a broad one, when considered with reference to penal legislation and all legislation intended for the promotion of the health, welfare and safety of the community, it is not without truth. It is evident, from the course of legislation framed for the purpose of affording greater protection to the class of the employed, that the people of this state have compelled the employer to do many things which at common law he was not under obligation to do. Such legislation may be regarded as supplementing the common-law rule of the employer's responsibility and is illustrative of the policy of the state. Therefore it is, when an agreement is sought to be enforced, which suspends the operation of the common-law rule of liability and defeats the spirit of existing laws of the state, because tending to destroy the motive of the employer to be vigilant in the performance of his duty towards his employés, that it is the duty of the court to declare it to be invalid and to refuse its enforcement.

I think that the judgment below was correct and should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment affirmed.

IDA E. NICKELL, Appellant, *v.* HARRIET TRACY et al., Respondents.

APPEAL — INCONSISTENT FINDINGS. When findings of fact are contradictory and irreconcilable, the defeated party is entitled to the benefit of those most favorable to himself.

Nickell v. *Tracy*, 100 App. Div. 80, reversed.

(Argued March 26, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

January 21, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank C. Ferguson for appellant. The judgment must be reversed for the reason that it is inconsistent with the findings made in the decision in favor of the plaintiff's contention. (*Schwinger* v. *Raymond*, 83 N. Y. 192; *Wahl* v. *Barnum*, 116 N. Y. 87; *Kelly* v. *Leggett*, 122 N. Y. 87; *T. Nat. Bank* v. *Parker*, 130 N. Y. 415; *Bonnell* v. *Griswold*, 89 N. Y. 122.)

A. G. Bartholomew for respondents. The judgment in favor of defendants' contention is consistent with the findings. (*T. Nat. Bank* v. *Parker*, 130 N Y. 415; *Green* v *Roworth*, 113 N. Y. 462.)

EDWARD T. BARTLETT, J. This action is brought to foreclose a mortgage and to reform the same by correcting the description and certain alleged clerical errors.

In October, 1849, Boyden and wife executed and delivered to Hadley their certain bond for four hundred dollars payable in three years from date, with interest at seven per cent. As collateral security for the payment thereof the obligors executed and delivered to Hadley the mortgage in suit covering premises in the town of Darien, Genesee county. In February, 1851, Boyden and wife conveyed the mortgaged premises to Evan Rice. Thereafter Evan Rice died intestate leaving him surviving his widow, Mary Rice, and three children, Ellen Rice, plaintiff's mother; Harriet Tracy, one of the defendants, and William Rice, a son, his only heirs at law and next of kin. Upon the death of Evan Rice, intestate, the title of the mortgaged premises vested in his three children, subject to the dower interest of the widow and the mortgage in suit. Evan Rice or Mary, his wife, were in pos-

session of the premises until 1891, when Mary Rice died, her husband having predeceased her.

In May, 1864, Hadley assigned the bond and mortgage to Ellen Rice; the latter died in May, 1879, intestate, owning the said bond and mortgage; and in October, 1880, James E. Ford (not the defendant in suit) was appointed her administrator. Ellen Rice left her surviving a daughter, the plaintiff, who was her sole heir at law and next of kin. Prior to October 20th, 1880, the said James E. Ford was duly appointed the general guardian of plaintiff's person and estate. On the 20th of October, 1880, Ford, as administrator, assigned the bond and mortgage to himself as general guardian of plaintiff. The latter became of age in May, 1882, and married one John H. Nickell. Thereafter Ford, as plaintiff's general guardian, transferred to her the bond and mortgage in suit.

It is necessary to state a few more facts in order to understand the defenses interposed. In July, 1902, an attorney representing the defendant Harriet Tracy, who had agreed to sell the premises to James O. Ford, one of the defendants, addressed a letter to the plaintiff, who was a resident of Minneapolis, in the state of Minnesota, which reads, in part, as follows: "In examining titles to property owned by Mrs. Harriet Tracy located at Darien, Genesee County, N. Y., which was formerly owned by your grandmother, Mary Rice, I find that the chain of title is broken, and that there is missing from the county clerk's office of Genesee County the deed from your grandfather, Evan Rice. In order to complete the title, will you kindly sign the enclosed quit-claim deed from your grandfather, Evan Rice, acknowledging same before notary. Have a notary's certificate from the clerk of your county attached to the deed and return the same to me as soon as convenient." The letter also asked the plaintiff to discharge or satisfy the mortgage in suit. The plaintiff, replying to this letter, executed the quitclaim deed therein inclosed, but referred to her Buffalo attorney the mortgage matter. An affidavit was later sent to the plaintiff to execute, but she referred it to her attorney and same was not executed.

This letter is inconsistent with the facts as subsequently found. Neither the defendant Harriet Tracy nor her mother, Mary Rice, is shown to have had full title to the mortgaged premises; the former, apparently, inherited a third interest from her father, and the latter was vested with a dower right. There is no finding that Evan Rice ever conveyed the premises in question.

About August 27th, 1902, the attorneys for the plaintiff exhibited the bond and mortgage, with indorsements thereon, to the defendants' attorney and demanded payment of the same. It is found that Mary Rice, on the 19th of September, 1882, made a partial payment of ten dollars on the bond and mortgage, which was duly indorsed on the bond. On the 16th of September, 1902, this action was begun. The defendants Harriet Tracy and James O. Ford interposed separate answers. After trial duly had, the Special Term found as conclusions of law that the bond and mortgage, under and by operation of law, had become paid and satisfied, and that the complaint should be dismissed, with costs. Judgment was entered accordingly.

Four distinct defenses were raised by the answers: (1) That the plaintiff was equitably estopped from enforcing the collection of the mortgage because of certain statements which she had made, to the effect that it was not a valid lien or incumbrance upon the property; (2) that the mortgage had been fully paid and satisfied by virtue of an oral agreement between Ellen Rice, plaintiff's mother, and Mary Rice, her grandmother, whereby said Mary Rice cared for the plaintiff from the time of her birth until she was seven years of age; the plaintiff was born in 1861; (3) the Statute of Limitations, it being alleged that more than twenty years had elapsed since the last payment was made of principal or interest; (4) that the execution and delivery of the said quitclaim deed by the plaintiff, while she was the owner of the mortgage, to the defendant Tracy operated as a release.

The learned Appellate Division held that the first two defenses were not established, and that the evidence relating

to the same was clearly incompetent and improperly admitted over plaintiff's objections and exceptions. The third and fourth defenses were deemed proved, and the judgment of the Trial Term was affirmed.

We have felt called upon to make a rather full statement of the facts and procedure in order to bring out clearly the point made by plaintiff's counsel, that we are confronted by inconsistent findings of fact, and the well-settled rule that where the findings are contradictory and irreconcilable the defeated party is entitled to the benefit of those most favorable to himself. (*Schwinger* v. *Raymond*, 83 N. Y. 192; *Bonnell* v. *Griswold*, 89 N. Y. 122; *Wahl* v. *Barnum*, 116 N. Y. 87; *Kelly* v. *Leggett*, 122 N. Y. 633; *Traders' Nat. Bank* v. *Parker*, 130 N. Y. 415.)

Notwithstanding the fact that the Appellate Division has decided that the bond and mortgage are cut off by the Statute of Limitations, and that the mortgage has been released by quitclaim deed, we have findings of the trial court as follows: "(8) that the said Ida E. Nickell was the owner of said bond and mortgage at the time of the commencement of this action and at the time of the trial thereof; (14) that there was unpaid upon said bond and mortgage at the date of said trial, November 1st, 1903, $538.18."

In the face of these findings and others that are more or less contradictory, as already pointed out, this judgment cannot stand. The discussion of the present situation will doubtless result in bringing out, on another trial, all the material facts. We express no opinion as to the merits.

The judgment appealed from should be reversed and a new trial granted, with costs to the plaintiff in all the courts to abide the event.

CULLEN, Ch. J., GRAY, WERNER and CHASE, JJ., concur; O'BRIEN, J., absent; HISCOCK, J., not sitting.

Judgment reversed, etc.

JANE A. McKENNA, Respondent, *v.* THE BROOKLYN UNION ELEVATED RAILROAD COMPANY et al., Appellants, Impleaded with Another.

1. EASEMENTS — ALTHOUGH RESERVED, PASS WITH CONVEYANCE OF FREEHOLD. Easements of light, air and access, appurtenant to real property abutting on a public street or highway, are inseparable from the dominant estate, and upon a conveyance of the latter such easements pass to the grantee, notwithstanding the grantor's attempted reservation of the same or of any rights of action for the invasion or destruction thereof.

2. EFFECT OF RESERVATION IS TO MAKE GRANTEE THE TRUSTEE OF MONEYS RECEIVED FOR SUBSEQUENT CONVEYANCE. Although such reservation in a deed is ineffectual to create a trust in such easements, it does create a resulting trust by virtue of which the grantee becomes a trustee for his grantor as to all moneys received or judgments recovered for the invasion or destruction of such easements.

3. GRANTEE ALONE CAN SUE FOR DAMAGES OR EXECUTE RELEASE. The owner of premises as to which such easements have been destroyed is the only person who can sue for the damages thus caused or who can execute a release in satisfaction thereof, and, therefore, a person or corporation invading or destroying such easements has the right to obtain a release from the owner of the dominant estate who alone is legally entitled to the resulting damages.

4. ACTION BY GRANTOR TO SET ASIDE SUBSEQUENT CONVEYANCE AND TO RECOVER DAMAGES FOR INVASION OR DESTRUCTION OF EASEMENTS. Where the abutting owner of property injuriously affected by the operation and maintenance of an elevated railroad brings the usual action for damages and, during its pendency, conveys the property, reserving, however, his easements and the right of action therefor, and subsequently the railroad company, with knowledge of such reservation, obtains from his grantee a release of the easements and of any right of action relating thereto, for a stipulated sum, and thereafter the former owner brings an action against the company and his grantee, demanding that the latter be declared a trustee for his benefit and that the release be declared void and set aside, a judgment reversing a decision of the trial court dismissing the complaint as to the company, apparently based upon the theory that the reservation in plaintiff's deed was effectual to create an equitable lien upon the easements which was binding upon the company, is erroneous, since there can be no lien upon such easements, separate and apart from the freehold to which they are appurtenant; the reservation created an equitable lien in favor of plaintiff as against his grantee, upon

the moneys received as a consideration for the release and nothing more, and in the absence of any allegation or proof of fraud or insufficiency of consideration, the amount received is conclusive as between them.

McKenna v. *Brooklyn Union El. R. R. Co.*, 95 App. Div. 226, reversed.

(Argued March 26, 1906; decided April 3, 1906.)

Appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 17, 1904, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and granting a new trial.

The facts in this case are undisputed. They are all set forth in the complaint, and those which are material to this appeal are substantially as follows: Sometime prior to September 19, 1900, the defendant the Brooklyn Union Elevated Railroad Company built an elevated railroad structure on Myrtle avenue in the borough of Brooklyn, city of New York, a portion of which structure was in front of the premises then owned by the plaintiff abutting on that avenue. On the day mentioned she commenced the usual action against the Brooklyn Union Elevated Railroad Company and its lessee, the defendant the Brooklyn Heights Railroad Company, to recover damages for interference with her easements of light, air and access and for an injunction.

While that action was pending and on July 1, 1901, the plaintiff conveyed the property to the defendant Mary E. Gordon. The deed then executed and delivered contained the following reservation: "Subject also to the party of the first part's (Plaintiff's) reservation of all right, title and interest of, in and to the easements occupied, abridged or used by The Brooklyn Union Elevated Railroad Company and their lessee the Brooklyn Heights Railroad Company, and a certain action now pending against said company and their lessee for injury to the fee and rental of said premises, and all right, interest, judgments or otherwise that may accrue therefrom, it being the intention of the party of the first part to convey said described premises, reserving all the right or rights of damages against the said railroad companies by reason of the

interference with the easements of light, air and access, and to hold the party of the second part (defendant Gordon) free from any charges or costs, judgments or otherwise, which may arise by reason of any action now pending against the said railroad companies, upon the understanding and agreement that the party of the second part will join with the party of the first part in all necessary papers or actions to enable the party of the first part to effectually and legally carry on her action, terminate the same, or carry out the directions or orders of the court in which such action is brought, and upon the termination of said action by settlement by judgment of the court, to release to the said railroad companies a right to the easements now occupied, used or abridged by them."

The deed containing this reservation was recorded on July 2, 1901, and the defendant railroad companies had knowledge of its provisions. Notwithstanding such knowledge, and while plaintiff's first action against the railroad companies was pending, the latter obtained from Mary E. Gordon (plaintiff's grantee) a general release expressing a nominal consideration, but given upon a consideration of $500, and absolving such railroad companies from all further damages arising by reason of the construction and maintenance of the elevated railroads in front of the premises referred to. This release was dated May 3, 1902, was in writing and under seal.

The complaint herein demands judgment: 1. That the defendant Gordon be declared a trustee for the benefit of the plaintiff under the provisions of the deed above referred to. 2. That the release made by said Mary E. Gordon to the defendant railroad companies be declared void and set aside, and the same canceled of record. 3. That the said Mary E. Gordon be ordered and directed to become a party to the action above referred to and directed to execute all proper and necessary papers in reference to the matters contemplated by the agreement between her and the plaintiff. 4. That the plaintiff have such other or further judgment or order in the premises as may be requisite and necessary in order to carry out and complete the terms and provisions of the trust agree-

ment contained in the deed of the plaintiff to said Mary E. Gordon.

At the conclusion of the trial the court found the facts above stated and rendered judgment dismissing the complaint as to the defendant railroad companies, but decreed that the defendant Gordon holds the $500 which she received from the railroad companies in trust for the plaintiff and that the plaintiff is entitled to judgment against her for that amount. The judgment entered upon that decision was reversed by the Appellate Division upon the law and facts, and the defendant railroad companies have now appealed to this court.

Charles L. Woody and *George D. Yeomans* for appellants. The agreement in the deed between McKenna, the grantor, and Gordon, the grantee, clothes the grantee with sufficient power to make a settlement with the railroad companies, and she having made such a settlement, the same cannot be assailed in this action. (*W. U. T. Co.* v. *Shepard*, 169 N. Y. 170; *Blackman* v. *Striker*, 142 N. Y. 560; *Foote* v. *El. R. R. Co.*, 147 N. Y. 367.) It was error to hold that the reservation in the deed of McKenna to Gordon did not give Gordon the authority to receive the money paid in settlement of the easements by the railroad company. (*Washburn* v. *Benedict*, 26 App. Div. 489; *Cowee* v. *Cornell*, 75 N. Y. 91; *Bailey* v. *Rider*, 10 N. Y. 363; *Bank* v. *White*, 6 N. Y. 236; *Forker* v. *Brown*, 30 N. Y. Supp. 827; *Reed* v. *C. C. G. Co.*, 47 Hun, 411; *Caldwell* v. *King*, 4 Cow. 207; *P. F. Ins. Co.* v. *Phillip*, 13 Wend. 81; *Taylor* v. *Fleet*, 4 Barb. 95; *Price* v. *Heath*, 41 Hun, 585; *Beardsley* v. *Duntley*, 69 N. Y. 577.) The relief which the Appellate Division has decided that the plaintiff may have is inconsistent with the relief asked for in the plaintiff's complaint. (*Fowler* v. *Bowery Sav. Bank*, 113 N. Y. 450; *Broege* v. *Ott Mfg. Co.*, 163 N. Y. 470.) The prayer in plaintiff's complaint was granted as far as the court at Trial Term had power to grant the same under the evidence. (*Fowler* v. *B. S. Bank*, 113 N. Y. 458.) The trial court did not err in

rejecting evidence offered by the plaintiff, and the Appellate Division did err in reversing this case because such evidence was excluded. (Perry on Trusts, § 187; *Jaeger* v. *Kelley*, 52 N. Y. 274.)

George W. Sickels and *Cyrus W. Washburn* for respondent. The plaintiff has an equitable interest or lien upon the property until a suit for past, present and future damages terminates in judgment or settlement by respondent. (*Peck* v. *Jenness*, 7 How. Pr. 612; *Buchan* v. *Sumner*, 2 Barb. Ch. 165; *Willetts* v. *Brown*, 42 Hun, 144; *Trustees, etc.*, v. *Lynch*, 70 N. Y. 440; *Smith* v. *Smith*, 51 Hun, 164; 125 N. Y. 224; *Lewis* v. *Gollner*, 129 N. Y. 227; *Bradley* v. *Walker*, 39 N. Y. S. R. 253; *Round Lake Assn.* v. *Kellogg*, 47 N. Y. S. R. 668; *Coleman* v. *Bresnahan*, 54 Hun, 619; *Matter of Coatsworth*, 37 App. Div. 295; *Mayor, etc.*, v. *Law*, 125 N. Y. 380.) The plaintiff acquired by express contract and covenant in deed, an easement or servitude in premises conveyed. (*Pegram* v. *N. Y. El. R. R. Co.*, 147 N. Y. 135; *W. U. T. Co.* v. *Shepard*, 169 N. Y. 180; *Mayor, etc.*, v. *Law*, 125 N. Y. 388; *Lewis* v. *Gollner*, 129 N. Y. 227.) The equitable effect of the reservation clause is to make the defendant Gordon, and her grantee, the railroad companies, trustees for the benefit of the plaintiff. (*W. U. T. Co.* v. *Shepard*, 169 N. Y. 181; *McKenna* v. *B. El. R. R. Co.*, 95 App. Div. 226; *Foote* v. *Bryant*, 48 N. Y. 543; *Pegram* v *N. Y. El. R. R. Co*, 147 N. Y. 135; *Trustees, etc.*, v. *Lynch*, 70 N. Y. 440; *Fletcher* v. *Morey*, 2 Story, 545; *Ketchum* v. *St. Louis*, 101 U. S. 306; *Field* v. *Mayor, etc.*, 6 N. Y. 178; *Stover* v. *Eyclesheimer*, 3 Keyes, 620; *Carver* v. *Creque*, 46 Barb. 507; *Nat. Bank* v. *Rogers*, 166 N. Y. 380; *Lewis* v. *Gollner*, 129 N. Y. 227.) The defendant railroad companies had full notice of the equitable claim of Jane A. McKenna, and their title will be postponed and made subservient to it. They were not *bona fide* purchasers. (*Clapp* v. *Byrnes*, 3 App. Div. 284; *Hodge* v. *Sloane*, 107 N. Y. 244; *Sweet* v. *Henry*, 175 N. Y. 276; *W. U. T. Co.* v. *Shepard*, 169 N. Y. 181; *McPherson* v.

Rollins, 107 N. Y. 316; *Anderson* v. *Blood*, 152 N. Y. 203; *Baher* v. *Bliss*, 39 N. Y. 70; *Acer* v. *Wescott*, 46 N. Y. 384; *Reid* v. *Gannon*, 50 N. Y. 345; *Trustees, etc.*, v. *Lynch*, 70 N. Y. 440; *Bennet* v. *Buchan*, 76 N. Y. 386; *Kirsch* v. *Tozier*, 143 N. Y. 390.)

Werner, J. A very brief statement of a few pertinent legal principles will suffice to dispose of the case at bar. 1. Easements of light, air and access, appurtenant to real property abutting upon a public street or highway, are inseparable from the dominant estate, and upon a conveyance of the latter such easements pass to the grantee, notwithstanding the grantor's attempted reservation of the same, or of any rights of action for the invasion or destruction thereof. (*Pappenheim* v. *Metr. E. R. Co.*, 128 N. Y. 436; *Kernochan* v. *N. Y. El. R. R. Co.*, Id. 559; *Pegram* v. *N. Y. El. R. R Co.*, 147 id. 135; *Foote* v. *Metr. E. R. Co.*, Id. 367; *Shepard* v. *Man. Ry. Co.*, 169 id. 160; *Western Union Tel. Co.* v. *Shepard*, Id. 170.)

2. Although such a reservation in a deed is ineffectual to create a trust in such easements, it does create a resulting trust by virtue of which the grantee becomes a trustee for his grantor as to all moneys received or judgments recovered for the invasion or destruction of such easements. (*Pegram* v. *N. Y. El. R. R. Co.*, *supra*; *Western Union Tel. Co.* v. *Shepard*, *supra*.)

3. The logical corollary of the two foregoing propositions is, that the owner of premises as to which such easements have been invaded or destroyed, is the only person who can sue for the damages thus caused, or who can execute a release in satisfaction thereof, and it follows as a necessary legal deduction that the person or corporation invading or destroying such easements has the right to obtain a release from the owner of the dominant estate, who alone is legally entitled to the resulting damages.

The complaint in the case at bar undoubtedly alleges facts which justify the legal conclusion that when the grantee

(Gordon) received from the railroad companies the moneys paid in consideration of the release executed by her, she became the trustee of the plaintiff (grantor) as to such moneys; and as these facts were not disputed the learned trial court properly held that the grantee (Gordon) should be brought in as a party defendant, to the end that there might be an adjudication of the matter as between her and the plaintiff. To this extent the decision at Special Term was concededly correct. But the plaintiff contends that it was error for the court to dismiss the complaint as to the defendant railroad companies, and to that view the learned Appellate Division gave its assent by reversing the judgment entered at Special Term. This disposition of the case seems to have been based upon the theory that the reservation in the deed from the plaintiff to Gordon, her grantee, was effectual to create an equitable lien upon the easements therein referred to, which was binding upon the railroad companies who took the release from Gordon with knowledge of the reservation in the deed to her. We cannot subscribe to this theory. It is fundamentally at variance with the established principles that such easements are inseparable from the estate to which they are appurtenant. Since there can be no lien upon such easements separate and apart from the freehold to which they are appurtenant, it is clear that upon the facts alleged in the complaint and established at the trial, the plaintiff was entitled to no relief as against the defendant railroad companies. The reservation in the deed from the plaintiff to the defendant Gordon accomplished nothing save the creation of an equitable lien in favor of the former as against the latter upon the moneys received as a consideration for the release of the easements, and in the absence of any allegation or proof of fraud or insufficiency of consideration, the amount thus received is conclusive as between them.

It is true that the plaintiff sought to prove inadequacy of consideration and such fraud as might be inferred from that circumstance, and the refusal of the trial court to receive such evidence is one of the grievances assigned by plaintiff

on this appeal. A sufficient answer to plaintiff's contention in that behalf is that the complaint contains no allegation to support such proofs. The plaintiff was given the opportunity at the trial to amend her complaint, which she declined, and the record as it stands clearly justifies the ruling of the trial court in dismissing the complaint as against the defendant railroad companies.

We need go no further to sustain the decision of the trial court, although it may be added that it is, to say the least, extremely doubtful whether the plaintiff could maintain any equitable action against the defendant railroad companies under any circumstances. There is absolutely no privity of contract or relation between them. The plaintiff's equitable remedy is against her grantee alone, who is impressed into the relation of trustee as to the fund, merely to prevent such wrongs and hardships as might be inseparable from an inadequate legal remedy. We do not say that circumstances may not arise under which a grantor in the position of the plaintiff may not have a cause of action against both her grantee and those to whom the latter may have released the easements, but we can conceive of no such case unless it be founded upon express allegations of affirmative fraud in which both releasor and releasee were active participants, and in such a case the remedy at law is usually sufficient, and as that question is not presented by this record we do not decide it.

The order of the Appellate Division should be reversed and the judgment entered upon the decision of the trial court affirmed, with costs in both courts.

Cullen, Ch. J., Gray, Edward T. Bartlett, Hiscock and Chase, JJ., concur; O'Brien, J., absent.

Order reversed, etc.

CELIA REILLY, as Administratrix of the Estate of DAVID REILLY, Deceased, Appellant, *v.* TROY BRICK COMPANY, Respondent.

NEGLIGENCE — SAFETY OF WORKING PLACE — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — ISSUE OF FACT. The facts examined in an action brought under the Employers' Liability Act (L. 1892, ch. 600) to recover damages for the alleged negligent killing of plaintiff's intestate, a common laborer, who had been in the employ of the defendant for several years, and was killed by the fall of a portion of a clay bank at the foot of which he was working, and *held*, that a direction of the trial court setting aside a verdict in favor of the plaintiff and directing a dismissal of the complaint was erroneous, where there was some evidence, raising the question as to whether or not the defendant had neglected to properly protect the place where the deceased was working; and also raising the question of the intestate's assumption of a particular risk or of his contributory negligence, all of which questions were, under the circumstances, for the jury.

Reilly v. *Troy Brick Co.*, 108 App. Div. 108, reversed.

(Argued March 27, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 27, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term after a verdict had been rendered in favor of plaintiff.

The action was brought to recover damages for the alleged negligent killing of the plaintiff's intestate, a laborer in the employ of the defendant. The defendant is engaged in the manufacture of brick within, or very near, the northerly boundary of the city of Troy. The accident which caused intestate's death happened at about 2 or 3 o'clock in the afternoon of June 4, 1904. At that time he was engaged, in company with several other laborers, in digging clay at the foot of a clay bank in the defendant's brick yard. A portion of the bank gave way, burying and killing the intestate and two other laborers.

The action is brought under the provisions of the Employers' Liability Act (L. 1902, ch. 600). The jury rendered a verdict in favor of the plaintiff for $3,000. The trial court

subsequently set aside the verdict and rendered judgment dismissing the complaint. The Appellate Division affirmed the judgment thus entered and allowed an appeal to this court.

George B. Wellington for appellant. The plaintiff in view of the nonsuit (and of the general verdict in her favor) is entitled to the most favorable facts and inferences to be found and drawn from the testimony. There is evidence to sustain a verdict for the plaintiff. (*Higgins* v. *Eagleton*, 155 N. Y. 466; *Ernst* v. *H. R. R. R. Co.*, 35 N. Y. 9; *Wolfkiel* v. *S. A. R. R. Co.*, 38 N. Y. 49; *Payne* v. *T. & B. R. R. Co.*, 83 N. Y. 572; *Smith* v. *N. Y. C. & H. R. R. R. Co.*, 177 N. Y. 224; *Read* v. *Spaulding*, 5 Bosw. 395; 30 N. Y. 630; *Greely* v. *State of New York*, 94 App. Div. 605; *Michaels* v. *N. Y. C. R. R. Co.*, 30 N. Y. 564.) The plaintiff could not be nonsuited upon the ground of contributory negligence of the deceased or assumption of risk by the deceased. (*Vaughn* v. *G. F. Cement Co.*, 105 App. Div. 136; *Buckley* v. *P. H. I. Co.*, 17 N. Y. S. R. 436; 117 N. Y. 645; *True* v. *L. V. R. R. Co.*, 22 App. Div. 588; *Jenks* v. *Thompson*, 179 N. Y. 20.)

Lewis E. Griffith for respondent. Before there can be any question in this case as to a safe place in which to work, or as to proper inspection, it must appear that there was a defect in the condition of the ways, works or machinery, which defect was due to the negligence of the employer or his superintendent, or that the injury was due to the negligence of the superintendent or of a person acting as such. (*Gmaehle* v. *Rosenburgh*, 178 N. Y. 147; *Lynch* v. *Allen*, 160 Mass. 252.) Having sued under the Employers' Liability Act, and having stated no other cause of action, the plaintiff must show that her case falls within the act or she must fail. (*Coffey* v. *R. R. Co.*, 155 Mass. 22; *Veyineu* v. *Morse*, 160 Mass. 143; *Rosin* v. *Manufacturing Co.*, 89 App. Div. 250.)

WERNER, J. The only question which we deem it necessary to consider upon this appeal is whether there was any evi-

dence of negligence on the part of the defendant, which, according to any reasonable view, justified the verdict of the jury. If there was, the learned trial court erred in setting the verdict aside, and the judgment dismissing the complaint must be reversed. In considering the question thus presented all contested facts must be assumed to have been found in favor of the plaintiff, and she is entitled to the most favorable inferences deducible from the evidence. (*Higgins* v. *Eagleton*, 155 N. Y. 466; *Place* v. *N. Y. C. & H. R. R. R. Co.*, 167 id. 345, 347; *Sundheimer* v. *City of N. Y.*, 176 id. 495; *Koehler* v. *N. Y. Steam Co.*, 183 N. Y. 1.)

David Reilly, the intestate, had been in the employ of the defendant since its incorporation, several years before the accident, and had also worked for the former owners of the property, covering a period of seven or eight years prior to that time. He was a common laborer working under the orders of either a bank boss or superintendent. The evidence discloses that in November, 1903, about seven months previous to the accident, a slide of clay from the defendant's bank had occurred at the same point where the intestate lost his life. The clay which was precipitated by the former slide lay along the floor of the yard extending outwardly from the foot of the bank. From that time to the day of the accident, the clay needed by the defendant for the making of brick was taken from the deposit thus formed. The process of removing this fallen clay had been going on from November, 1903, until the day of the accident, when this source of supply had become very nearly exhausted, and the intestate with his fellow-laborers were working within 15 or 20 feet from the foot of the bank.

The bank itself was from 65 to 70 feet high, with a slope which, the jury might have found, was only 20 feet from an imaginary vertical line starting at the foot of the bank and extending to the top. The portion of the bank that slid or caved was about 100 feet in width. A stratum of sand formed the floor, as it was called, upon which the bank rested, and in removing the old clay of the former slide the workmen left

about four feet on the sand; but in some places they dug down so that the sand underneath was visible. A former superintendent of the defendant, testifying in behalf of the plaintiff, described how the slide of 1903 occurred, and said: "I could tell from where the clay laid how it came, how the slide occurred. It slid right out from the bottom the same as this one did, pushed out."

The plaintiff's evidence tended to show that it is a common custom in such places to employ bank bosses, as they are called, to direct the movements of the men at work on the clay banks, and to look out for their safety. It also tends to show that the defendant employed such a bank boss until shortly after the slide of 1903 had occurred. After that time Morrissey, the president of the defendant, seems to have acted as superintendent and directed the work of the laborers at the bank. He was there frequently during the day, and the evidence shows that about ten minutes before the accident he looked over the bank and saw no indications of danger. The slide seems to have occurred without warning.

It must be conceded that the evidence tending to show that defendant was guilty of negligence is very meagre, but we do not think it can be held as matter of law that there was no evidence to that effect. In its final analysis the question is whether there was any evidence which, considered in the light of the practically undisputed facts as to the existing physical conditions and the circumstances attending the death of plaintiff's intestate, would warrant a jury in finding that the defendant had omitted to perform some affirmative duty which it owed to its employees engaged in working upon that bank. We think there was such evidence. This was a high, steep bank of heavy clay resting upon a sub-stratum of sand. The accident of November, 1903, when a large portion of the bank "buckled" or bulged out from the bottom and caused a slide of large and dangerous dimensions, was a demonstration of peril which none of the ordinary safeguards of inspection, based upon surface indications, would suffice to anticipate or prevent. The great deposit of clay formed by

that slide, so long as it remained undisturbed, furnished an ample lateral support for the remaining part of the bank, but when removed the former condition of danger was necessarily reinstated. That was precisely the situation on the day when Reilly was killed. The lateral support spoken of had been nearly all removed. The workmen had dug away the clay on the floor to a point about fifteen or twenty feet from the base of the bank. All this was done with the knowledge and acquiescence of the defendant's superintendent, and while the jury might well have found upon the evidence adduced that the ordinary inspection of the bank had not been neglected they might still have concluded that the larger and, as we think, the more obvious duty of protecting the base of this bank had been overlooked. It is true that the plaintiff's intestate was there daily and that his experience, even as an ordinary laborer, might have enabled him to anticipate the danger quite as thoroughly as his superior ought to have done, but whether he assumed that particular risk or was guilty of contributory negligence under the circumstances detailed were questions of fact for the arbitrament of a jury. It cannot be said as a matter of law that this common laborer, whose business it was to dig and to shovel, was chargeable with the same knowledge of existing physical conditions or possibilities as those whose primary duty it was to know all that a reasonably careful and prudent employer should have known or anticipated from what had gone before.

Other questions are presented on the briefs of counsel which may not arise on another trial, and since the question briefly treated by us is sufficient to compel a reversal we will not prolong the discussion.

The judgment of the Appellate Division should be reversed and a new trial granted, with costs to the appellant to abide the event.

CULLEN, Ch. J., EDWARD T. BARTLETT and HISCOCK, JJ., concur; GRAY, J., not voting; O'BRIEN, J., absent; CHASE, J., not sitting.

Judgment reversed, etc.

CHARLES DUHME, an Infant, by HENRY DUHME, his Guardian ad Litem, Respondent, *v.* HAMBURG-AMERICAN PACKET COMPANY, Appellant.

1. WHARVES AND PIERS — OBLIGATION OF STEAMSHIP COMPANIES TO PERSONS, OTHER THAN PASSENGERS, AWAITING THE DOCKING OF VESSELS. A steamship company owes no duty to persons upon its pier, awaiting the disembarking of passengers from an incoming vessel, whether they are there as mere licensees or because of an implied invitation from the company, except to have the pier in a reasonably safe condition for access and to exercise such ordinary care in the process of docking the vessel as to render it reasonably safe for persons to remain upon the pier.

2. NEGLIGENCE — RULE OF RES IPSA LOQUITUR — WHEN APPLICABLE. In actions brought to recover for injuries caused by the negligence of a defendant or his servants in which the relations of the plaintiff and defendant are not of a contractual nature, the rule of *res ipsa loquitur* is applicable only when there are actually shown such facts and circumstances, in the nature of the defendant's undertaking and of the accident itself, from which the jury are able, if not compelled, to draw an inference of negligence; it was not intended that the rule should exempt the plaintiff from the burden of proving, affirmatively, negligence, or circumstances making negligence a legitimate, if not an irresistible, inference.

3. SAME — ACTION TO RECOVER FOR INJURIES CAUSED BY BREAKING OF STEEL HAWSER USED IN WARPING VESSEL INTO A PIER — WHEN DOCTRINE OF RES IPSA LOQUITUR DOES NOT APPLY. Where in an action brought to recover for injuries received by an infant — while standing with his mother in an opening at the edge of a pier awaiting the arrival of a passenger on a transatlantic steamship, from being struck in the face by a steel hawser, with which the steamship was being warped alongside the pier, the hawser being suddenly released and recoiling with great violence by the breaking of an iron "shackle," or clamp, through which the hawser was fastened to a mooring post — there is no evidence on the part of the plaintiff, beyond the statement of the sudden breaking of the hawser, tending in the remotest degree to prove any negligence on the part of the defendant, and the evidence for the defendant shows that the pier was a safe place had the plaintiff and his mother heeded the warnings of defendant's servants and kept within its shelter, and that the breaking of the "shackle" was not due to any defect in its material or manufacture or to the omission of any care in handling the hawser, the circumstances permitting the natural inference that the "shackle" yielded to the tremendous strain put upon the hawser in bringing the vessel from the channel into its berth at the pier, the doctrine of *res ipsa loquitur* does not apply.

Duhme v. *Hamburg-American Packet Co.*, 107 App. Div. 237, reversed.

(Argued March 26, 1906; decided April 6, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 27, 1905, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank Verner Johnson for appellant. The mere fact that the hawser broke under the circumstances disclosed by the evidence creates no presumption of negligence. (*Dougherty* v. *Milliken*, 163 N. Y. 527; *Welsh* v. *Cornell*, 168 N. Y. 507; *Dobbins* v. *Brown*, 119 N. Y. 188; *De Graff* v. *N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 125; *Smith* v. *N. Y. C. & H. R. R. R. Co.*, 164 N. Y. 491; *Bucher* v. *Pryibil*, 19 App. Div. 126; *Haughey* v. *Thatcher*, 89 App. Div. 375; *Fink* v. *Slade*, 66 App. Div. 105; *Leyh* v. *N. E. R. Co.*, 41 App. Div. 218; 168 N. Y. 667; *Kirby* v. *D. & H. C. Co.*, 20 App. Div. 473.) Even where the happening of an accident, together with the surrounding circumstances, creates a presumption of negligence, such an inference is not permissible in the face of uncontradicted evidence rebutting such presumption. (*Griffen* v. *Manice*, 74 App. Div. 371; 174 N. Y. 505.)

Nathan D. Stern for respondent. The duty imposed upon the defendant toward the plaintiff upon the facts established in this case was the exercise of reasonable and ordinary care toward the plaintiff. (*Hart* v. *Grenell*, 122 N. Y. 371.) The doctrine of *res ipsa loquitur* applies in the case at bar. (*Coleman* v. *M. I. F. Co.*, 168 Mass. 254; *White* v. *B. & A. R. R. Co.*, 144 Mass. 404; *Griffen* v. *Manice*, 166 N. Y. 188; *Miller* v. *O. S. S. Co.*, 118 N. Y. 199; *Scheidler* v. *A. B. Co.*, 78 App. Div 163; *Mullen* v. *St. John*, 57 N. Y. 567; *Breen* v. *N. Y. C. & H. R. R. R. Co.*, 109 N. Y. 297; *Fitzpatrick* v. *G. F. Co.*, 49 Hun, 288; *Raney* v. *La Chance*, 70 S. W. Rep 376.)

GRAY, J. The plaintiff seeks to recover damages of the defendant for personal injuries sustained through the breaking of a hawser, while one of its steamships was being brought into its pier. The result of the trial of the action, so far as our review is concerned, was the dismissal of the complaint by the trial court upon the case, as made by the evidence of both parties. The Appellate Division, in the second department, reversed the judgment thereupon entered in favor of the defendant and ordered a new trial. The defendant has appealed to this court and the question for our consideration relates to the sufficiency of the evidence as to the defendant's negligence to make the case one for the determination of the jury.

The plaintiff, a boy about nine years of age, accompanied by his mother, was upon the defendant's pier, at Hoboken, New Jersey, expecting a relative to arrive upon the steamship "Moltke." Upon the steamship reaching the pier, and when in the course of being warped in alongside of it, the plaintiff and his mother were standing at an opening of the pier shed, or building, which was guarded by a rope drawn across. A wire rope, or hawser, which ran from the vessel to a mooring post on the pier, parted and, in the recoil consequent thereupon, the plaintiff was struck violently in the face. The wire rope itself did not break; but the "shackle," as it is termed, which fastened an end of the rope brought around upon it so as to form a loop, gave way. It was alleged in the complaint, as the cause of action, that the defendant "was negligent and careless in the management and operation of the pier or dock, and of said vessel, while so attempting to make the same fast to said pier or dock, and so carelessly and negligently operated and managed the same, that, in consequence thereof * * * a hawser parted and broke." Upon the trial, the plaintiff's evidence was confined to the nature of the injuries sustained and to occurrences upon the pier. Beyond the statement of the sudden breaking of the hawser, there was no evidence tending, in the remotest degree, to prove the allegation of negligence made in the complaint. There was evidence of

the presence of a large number of persons upon the pier and that, in consequence, the plaintiff and his mother were pressed upon and pushed forward in the opening. On the defendant's part the evidence could furnish no explanation of the cause of the parting of the hawser; but it did show that it had been recently purchased; that it was of the size usual for the purpose for which it was then used; that it was in good condition and that the shackle showed a clean break, that is, one not the result of some flaw, or defect, in the metal. It, also, showed that efforts were made by the employés of the defendant upon the pier to keep the people away from the openings, which were necessarily there for the purpose of the business, by pushing them back and by warning them of the danger of remaining in such a place. That these precautionary efforts had been made appeared, also, from the cross-examination of the plaintiff's witnesses.

It was the view of the court below, in reversing the judgment upon the nonsuit, that the doctrine of *res ipsa loquitur* was applicable to a casualty of the character disclosed by the proof and that, in the absence of explanation by the defendant, the inference of negligence was authorized under the circumstances. I think that there was error in the reversal and that the doctrine of *res ipsa loquitur* had no place in the determination of the issue. It was incumbent upon the plaintiff to give some evidence establishing, or tending to establish, negligence on the part of the defendant and it was not sufficient for his case to merely prove the accident. I think that the plaintiff was upon the pier as a mere licensee, for he and his mother had no permission to be there, from the defendant, or from the custom house authorities; but if we assume that they were there lawfully, because of an implied invitation, I cannot perceive that the defendant was under any other obligation to them, or owed them any other duty, than to have its pier in a reasonably safe condition for access. (*Beck* v. *Carter*, 68 N. Y. 283.) If we shall assume, further, that its duty extended to the exercise of such ordinary care in the process of docking its vessel, as to render it reasonably safe for

persons to remain upon the pier, we shall have stated the fullest measure of the defendant's obligations. It was under no other and before it could be held to a liability for the accidental injury to this plaintiff, it would be necessary to show a neglect of duty in the respects mentioned, if not by direct testimony, at least by such facts, or circumstances, as would permit the jury, fairly, to infer the existence of negligence. The burden of proof was upon the plaintiff to show the defendant to have been at fault; but there was no such evidence and, when the case was closed, neither carelessness in management, nor any defect in appliances, was made to appear. Indeed, upon the plaintiff's evidence the trial court might well have dismissed the complaint, for the failure to show any negligence; but when the evidence of the defendant was in, any suggestion of there having been a failure to exercise care was completely negatived.

We may admit that the doctrine of *res ipsa loquitur* is not, or should not be, confined to cases of contractual relations, such as those sustained with a carrier, or a bailee, (*Griffen* v. *Manice*, 166 N. Y. 188); but that does not advance the argument for the appellant. That doctrine, plainly, is based upon the general consideration that where the management and control of the thing, which has occasioned the injury, are in a defendant, it is within his power to produce evidence of the actual cause of the accident, which the plaintiff may be unable to do. "Its application," as was observed by Judge CULLEN in *Griffen* v. *Manice*, "presents, principally, the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversible, or principal, fact in issue, the defendant's negligence." When it is claimed that the accident is such as, in the ordinary course of the business, does not happen, with the exercise of reasonable care, and, therefore, that it speaks for itself, as imputing neglect to the defendant, the case should be one where, if not the relations of contract between the parties, the circumstances that bring them into relation are such as to create a duty to exercise care, which an injured party may, legally,

complain of if neglected. If the plaintiff were a passenger, that relation would require the exercise of the important degree of care commensurate with the contract of carriage. It would render the defendant liable for the slightest neglect against which human prudence and foresight might have guarded, as to results from defective conditions, found to exist in machinery, appliances, or other matters essential to safety of operation. (*Stierle* v. *Union Ry. Co.*, 156 N. Y. 70, 684; *Morris* v. *N. Y. C. & H. R. R. R. Co.*, 106 ib. 678; *Miller* v. *Ocean S. S. Co.*, 118 ib. 199; *Breen* v. *N. Y. C. & H. R. R. R. Co.*, 109 ib. 297; *Holbrook* v. *Utica & S. R. R. Co.*, 12 ib. 236.) In all such cases, the conditions may be such as to warrant the application of the rule of *res ipsa loquitur*. Its operation, where the relations are not of a contractual character, can only be, as in *Griffen* v. *Manice*, where there are actually shown such facts and circumstances, in the nature of the defendant's undertaking and of the accident itself, from which the jury are able, if not compelled, to draw the inference of negligence. It was not intended that it should exempt the plaintiff from the burden of proving, affirmatively, negligence, or circumstances making negligence a legitimate, if not an irresistible, inference. In *Peck* v. *N. Y. C. & H. R. R. R. Co.*, (165 N. Y. 347), where the plaintiff, who owned a building near the defendant's track, sued for compensation for the destruction of his property by fire, it was held that it was necessary for him to affirmatively establish negligence on the part of the defendant, either in the condition, or in the operation, of its engine, for which the mere occurrence of the fire was not sufficient; but that "it was not necessary that he should prove either the specific defect in the engine, or the particular act of misconduct in its management, or operation, constituting the negligence causing the injury complained of. It was sufficient, if he proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition, or negligently operated." It was in those terms that the present chief judge found the expression of the under-

lying principle of the maxim under discussion. (*Griffen* v. *Manice*, *supra*.) It will be observed that, in the present case, the record is absolutely bare of any facts, or circumstances, permitting of an inference of negligence. The parting of the hawser did not speak for itself, as imputing negligence to the defendant, and to leave it to jurors to say whether it was the result of negligence would be to invite them to speculate upon possibilities, without any basis in fact. The pier was a safe place, had the plaintiff and his mother kept within its shelter and had they heeded the warnings of the defendant's servants. The breaking of the shackle was not shown to be due to any defect in its manufacture, or to the omission of any care in handling, and the circumstances disclosed, simply, permit the natural inference that it yielded to the tremendous strain put upon the hawser in bringing the vessel from the channel into its berth at the pier. Clearly, as I think, this plaintiff was not so circumstanced towards the defendant, as that the mere fact of the accident furnished a reason for the inference of negligence, or exempted him from the general rule that negligence must be established, actually, or inferentially, from facts proved, when charged as a cause of action.

I advise the reversal of the order of the Appellate Division and the affirmance of the judgment dismissing the complaint, with costs in both courts to the appellant.

CULLEN, Ch. J., WERNER, HISCOCK and CHASE, JJ., concur; EDWARD T. BARTLETT, J., dissents; O'BRIEN, J., absent.

Ordered accordingly.

MATILDA J. MACKENNA, Appellant, *v.* THE FIDELITY TRUST COMPANY OF BUFFALO et al., Respondents.

1. MORTGAGE FORECLOSURE — RIGHT OF WIFE TO REDEEM LAND SOLD IN ACTION TO WHICH SHE WAS NOT A PARTY. A wife not made a party to an action foreclosing a mortgage upon premises owned by her husband, by reason of her inchoate right of dower therein, has the right, after a sale and during his lifetime, to redeem them, and may maintain an action against the purchaser (in this case the holder of the mortgage) for that purpose.

2. ACTION TO REDEEM — MEASURE OF RELIEF. The plaintiff in such an action is entitled to the adequate protection of her rights, but no more. She cannot speculate at the expense of the purchaser by waiting until the lands have materially increased in value and then seek to redeem as matter of right, provided the purchaser offers or the court requires him to fully protect her in some other way. Where, therefore, the action was brought nearly two years after the sale, during which time the lands had materially increased in value, a decree, giving her the right of election between a release of her dower right from the lien of the mortgage under which the purchaser took title or the payment to her of the value thereof, with the right to full redemption, if the purchaser does neither, accords to her exact justice; and she is not entitled to a conveyance of the property upon payment of the amount of the mortgage, interest thereon and taxes to the day of redemption.

3. IMPROPER ADJUSTMENT OF EQUITIES BETWEEN THE PARTIES. A modification of such decree, however, requiring the plaintiff as a condition of redemption to pay to the purchaser the amount of a deficiency judgment obtained by him in another foreclosure, relating to other property, or to deduct the amount from the sum to be paid if she elected to accept the value of her inchoate right of dower, is erroneous; the circumstances not requiring any general adjustment of equities as between the parties, but only such as are directly connected with the land in question and for which the purchaser would be entitled to hold it as security.

Mackenna v. *Fidelity Trust Co.*, 98 App. Div. 480, modified.

(Argued March 19, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 8, 1905, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term, and also affirming an intermediate order of reference made in the action.

This action was brought by a married woman during the lifetime of her husband to redeem lands from a judicial sale upon the ground that she was not a party to the action in which the decree to sell was made, although she had an inchoate right of dower in the premises sold.

On the 21st of February, 1896, Joseph Mackenna, who was then and still is the husband of the plaintiff, became the owner in fee of certain premises in the city of Niagara Falls, subject to a mortgage thereon given by a prior owner on the third of December, 1895, to secure the payment of $23,525 with interest. On the second of February, 1897, said mortgage and the bond accompanying the same were assigned to the defendant the Fidelity Trust Company. On the 18th of December, 1899, an action was commenced by the trust company to foreclose said mortgage, but the plaintiff was not made a party thereto and she did not appear therein. It resulted in the usual judgment of foreclosure and sale rendered on the 22nd of June, 1900, the amount unpaid having been fixed at the sum of $20,758.69 and the costs taxed at $175.89. Pursuant to said decree the premises, with the exception of certain lots which had been released, were sold to the trust company on the 18th of July, 1900, for the sum of $10,000, and after a deed in the usual form had been executed and delivered by the sheriff the purchaser entered into possession. The plaintiff had personal knowledge of the pendency of the action and the time and place of sale, but she took no steps to protect her interests.

On the 19th of December, 1899, said trust company commenced an action to foreclose a mortgage, which it had acquired by assignment, executed by the plaintiff to one Porter upon another piece of property. This action resulted in a decree and sale, and on the 1st of June, 1901, the trust company recovered a judgment therein against the plaintiff herein for the sum of $1,019.48, that being the amount of the deficiency arising upon such foreclosure. Before the commencement of this action the plaintiff tendered to the trust company the amount due on the judgment of foreclosure of the first

mortgage above named with interest, offered to pay all taxes paid by the trust company, and demanded that it should execute a deed to her covering the premises described in that mortgage, but such offer was refused and the demand was not complied with. Thereafter, and on the 10th of March, 1902, the plaintiff commenced this action to redeem and for an accounting as to rents and profits. The premises had then increased in value and were worth the sum of $38,000.

The trial court found the foregoing facts in substance, and found as conclusions of law that the plaintiff had the right to maintain an action to redeem during the lifetime of her husband; that she should not be required, as a condition of redemption, to pay the deficiency judgment of $1,019.48 obtained by the trust company against her, nor to pay the costs of the action to which she was not a party commenced to foreclose the principal mortgage; that redemption should be denied if the trust company should release plaintiff's right of dower from that mortgage, or pay her the value of her inchoate right of dower; that she should have thirty days to elect between these alternatives; that if the defendant should fail to release plaintiff's dower or satisfy it, in case she elected to accept either form of relief, she should have the right to redeem "upon payment of the amount due on the mortgage, $18,998.19 with interest thereon from the 3rd of December, 1898, and upon payment of * * * all taxes paid" on said premises by the trust company up to the day of redemption. Costs were allowed to neither party.

From the judgment entered accordingly both parties appealed to the Appellate Division, the defendant from every part thereof and the plaintiff from that part which denied her the right to redeem except upon the condition named. She also gave notice of her intention to bring up for review an order entered in the action appointing a referee to take testimony as to the value of the property involved and the amount paid by the trust company for taxes. The Appellate Division affirmed the order of reference and modified the judgment "by requiring the plaintiff to pay the judgment of

$1,019.48 if redemption is had, or in the alternative deducting the amount of the judgment from the sum to be paid by the defendant," and as so modified the judgment was affirmed, with costs to the trust company, two of the justices dissenting. The plaintiff appealed to this court from both judgment and order, but the trust company did not appeal from either.

Ulysses S. Thomas for appellant. The plaintiff's inchoate right of dower gives her an absolute right of redemption and upon payment of the mortgage debt with interest, tendered by her, she is entitled to a conveyance of the property. (Thomas on Mort. § 675; *Kursheedt* v. *U. D. S. I.*, 118 N. Y 358; *Clifford* v. *Kampfe*, 147 N. Y. 383; R. S. 744, § 1; Pom. Eq. Juris. § 1220; Jones on Mort. § 1067; *Taggart* v. *Wade*, 3 N. Y Supp. 322; *Campbell* v. *Ellwanger*, 81 Hun, 259; *Crisfield* v. *Murdock*, 127 N. Y. 315; *McMichael* v. *Russell*, 68 App. Div. 104.)

Louis L. Babcock for respondents. As the plaintiff's interest in the property consists only of an inchoate right of dower therein, she cannot maintain an action to redeem. (*Withaus* v. *Schack*, 105 N. Y. 332; *Aikman* v. *Harsell*, 98 N. Y. 186; *Hinchliffe* v. *Shea*, 103 N. Y. 153; *Elmendorf* v. *Lockwood*, 57 N. Y. 322; *Lawrence* v. *Miller*, 2 N. Y. 245; *Moore* v. *Mayor*, 8 N. Y. 110; Jones on Mort. [4th ed.] § 1059; *Campbell* v. *Ellwanger*, 81 Hun, 259; *Taggart* v. *Rogers*, 49 Hun, 265; *McMichael* v. *Russell*, 68 App. Div. 104.) The conditions contained in the judgment rendered upon the decision of the trial court in limitation of the plaintiff's claim were fair and equitable and should be sustained. (*Taggart* v. *Rogers*, 12 N. Y. Supp. 113; *Wetmore* v. *Roberts*, 10 How. Pr. 51.)

VANN, J. The primary question is whether the plaintiff had the right to redeem, although her husband was still alive and her right of dower inchoate only. The question has been discussed somewhat but never decided by this court. It was not involved in *Mills* v. *Van Voorhies* (20

N. Y. 412), but in considering the question whether the inchoate right of a married woman to dower was affected by a foreclosure to which she was not a party, it was said by SELDEN, J.: "A *feme covert*, who executes a mortgage jointly with her husband, is nevertheless entitled to dower in the equity of redemption of which her husband is seized notwithstanding the mortgage, and this right, as we have seen, is not affected by a foreclosure in equity unless she is made a party. If omitted she can come in at any time afterward and redeem, notwithstanding a decree and sale in the foreclosure suit." After commenting upon *Bell* v. *Mayor etc., of New York* (10 Paige, 50) the learned judge continued: "In that case the foreclosure was not completed until after the death of the mortgagor, and hence it did not become necessary to determine the effect of a foreclosure in his lifetime. There is not the slightest reason, however, for giving to such a foreclosure any greater effect in cutting off the dower rights of the wife of the mortgagor than to one which takes place after his death. The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow. Neither can be impaired by any judicial proceeding to which she is not made a party."

In *Moore* v. *Mayor etc., of New York* (8 N. Y. 110) it was held, under a statute then in force, that when lands are taken under the power of eminent domain the public acquire an absolute title free from the wife's inchoate right of dower, even if she is not made a party to the proceeding. Still, in *Simar* v. *Canaday* (53 N. Y. 298, 304) it was said: "We think that it must be considered as settled in this State, notwithstanding *Moore* v. *Mayor* and some *dicta* in the other cases that, as between a wife and any other than the State or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in the lands is a subsisting and valuable interest which will be protected and preserved to her and that she has a right of action to that end." Accordingly, it was held that a married woman had a right of action for damages sustained by the loss of her inchoate right of dower against one

who had procured a conveyance of lands from her husband by means of fraudulent representations, although he was still living and she had joined in the conveyance. "Public policy allows a wife to maintain in the lifetime of her husband an action to cancel, as forged, a recorded deed purporting to have been executed by her, together with her husband, instead of waiting for an admeasurement of dower after her husband's death." (*Clifford* v. *Kampfe*, 147 N. Y. 383.)

The Supreme Court has repeatedly held that a wife can maintain an action to redeem during the lifetime of her husband. (*McMichael* v. *Russell*, 68 App. Div. 104; *Campbell* v. *Ellwanger*, 81 Hun, 259; *Taggart* v. *Rogers*, 49 Hun, 265.) This is the rule in other states without exception so far as our researches disclose. (*Davis* v. *Wetherell*, 13 Allen, 60; *Gatewood* v. *Gatewood*, 75 Va. 407, 412; *Smith* v. *Hall*, 67 N. H. 200; *Vaughan* v. *Dowden*, 126 Ind. 406, 407; *Williams* v. *Stewart*, 25 Minn. 516, 519.) The elementary works lay down the same rule. (2 Jones on Mortgages [6th ed.], § 1067; Thomas on Mortgages [2d ed.], § 622.)

We adopt the rule as sustained by authority and founded on sound and just principles. The right to redeem is a necessary incident of a mortgage and it extends beyond the mortgagor to all who claim through or under him. As to the mortgagor it is the right to pay the mortgage as soon as it is due and relieve his lands from the lien thereon. If he fails to redeem, however, any one who claims through him may pay the mortgage and thereupon by operation of law that person becomes subrogated to his rights. The right of redemption in such a case involves the right of subrogation, which will be treated in equity as an assignment to the extent required to adequately protect the one who redeems. (*Arnold* v. *Green*, 116 N. Y. 566, 571.) The person who, in order to protect his interests, is thus "compelled to pay a debt which ought to have been paid by another, is entitled to exercise all the remedies which the creditor possessed against that other and to indemnity from the fund out of which should have been made the payment which he has made." (Sheldon on

Subrogation, § 11.) The one thus redeeming does not take as an absolute purchaser, but is simply subrogated to the place of the mortgagee for protection and indemnity unless, as may be the case, he is reimbursed and redemption is made from him. (Id. § 51.) An inchoate right of dower depends on marriage and the seizin of the husband. The wife thus acquires an interest through her husband, and it is well established that she is a necessary party to an action of foreclosure, because she has an interest to protect. (*Kursheedt* v. *Union Dime Savings Institution*, 118 N. Y. 358.) She can protect that interest only through the right of redemption, unless she purchases at the sale, as even a stranger may. The logical effect of the rule that she is a necessary party in order to give a good title through the foreclosure of a mortgage is that she can redeem before judgment, although her husband is alive. There is no reason for making her a party unless she can protect her inchoate right of dower by redeeming during the pendency of the action. If she can redeem *pendente lite*, when made a party, she can redeem after judgment and sale, when not made a party, through an action brought for that purpose.

As, however, she comes into a court of equity for relief, she must do equity herself and cannot be permitted to secure more than adequate protection of her rights or to make a profit out of her own delay and the mistake in the suit to foreclose. She cannot speculate at the expense of the purchaser by waiting, as she did, until the lands have materially increased in value, or, as it may be, until improvements have been made thereon and then seek to redeem as matter of right, provided the purchaser offers, or the court requires him to fully protect her in some other way. (*Mickles* v. *Dillaye*, 17 N. Y. 80, 83.) As she is made whole by the right to elect between a release of her dower right from the lien of the mortgage under which the trust company took title, or the payment to her of the value thereof, with the right to full redemption if the company does neither, she has no cause to complain, for that is exact justice. She thus secures such

protection as places her in a better condition than she was before, for she may now have the value of her inchoate right, and can retain it even if her husband survives her. After thus recovering her own, she cannot ask a court of equity to do an inequitable thing for her in violation of one of its primary rules. She must accept full protection of her own rights, without injury to the rights of others.

This subject was considered by our present chief judge, who presided at the second trial in *Taggart* v. *Rogers* (*supra*). His opinion does not appear to have been reported, but a copy was furnished upon the argument before us, and we quote with approval the following therefrom: "The foreclosure was not void, for the owner of the equity of redemption was made a party to it and his estate was cut off by the decree and sale. The plaintiff was not affected by the foreclosure, for she was not served with process. Her right to redeem rests in equity upon the principle that her rights should not be cut off without her day in court. But it seems plain on principle that equity will go only to the extent of protecting her rights and not give her any greater right by reason of the irregular foreclosure than she had before. The rule that a party must redeem the entire premises from the lien of the whole mortgage is primarily for the benefit of the mortgagee, and is not of universal application. Here the plaintiff had, before the foreclosure, an inchoate right of dower in the premises. It is not only possible, but in many cases probable, that on account of the enhancement in value of the premises the purchaser, treating him as a mortgagee in possession, may have been entirely repaid the mortgage debt out of the rents and profits. It may be also in this case. Is, then, the property to be conveyed to the plaintiff without consideration? Conceding that the defective foreclosure in no wise impaired her rights, on what principle of law or equity can it be contended that a defect in a suit to which she was not a party operated to convey to her an estate she never before possessed? In case there should prove to be something still unpaid on the mortgage, as long as such sum in addition to the value of the

estate or lien sought to be protected by the redemption is less than the value of the premises, the injustice of a general redemption still exists. The difference between the two cases is in degree, not in kind. The foreclosure passed to the defendant the title of all parties in interest, save that of the plaintiff. Of the title so acquired by the defendant he should not be deprived if he is willing to release the estate of the plaintiff from the lien of the mortgage, or to satisfy her claim. Thus the plaintiff's rights will be protected and the defendant will not be deprived of his purchase. (Citing *Boqut* v. *Coburn*, 27 Barb. 230.)"

The judgment rendered in that case, which was on all fours with that rendered by the trial court in this, was affirmed by the General Term. (*Taggart* v. *Rogers*, 12 N. Y. Supp. 113.) We think the plaintiff had no absolute right of redemption under the circumstances, and that the conditions imposed by the trial judge were such as were required from a court of equity.

This brings us to the modification made by the learned Appellate Division by requiring as a further condition of redemption that the plaintiff should pay the judgment for $1,019.48 recovered against her by the trust company in another action, or deduct the amount thereof from the sum to be paid her, if she elects to accept the value of her inchoate right of dower. The trial judge denied this relief and the theory upon which the Appellate Division proceeded in granting it was, that inasmuch as the judgment was a just debt, the trust company should not be compelled to collect it "by circumlocution," but that "all of the equities should be adjusted now, and all matters in any way connected with the property finally adjusted between the parties." The subject received only incidental consideration in the opinion, and we think that error was inadvertently committed by the modification.

The circumstances did not call for a general adjustment of equities between the parties, but only such as were directly connected with the land in question, and "for which the purchaser would be entitled to hold the land as security." (*Par-*

mer v. *Parmer*, 74 Ala. 285, 289; 2 Jones on Mortgages, § 1070.) The judgment which the plaintiff was in effect ordered to pay had no connection with that land and was never a lien thereon. There was no more reason for deducting it than if it had been recovered on a promissory note, given for a grocery bill and purchased by the trust company. If she ever redeems, the judgment will attach as a lien on the premises at the moment of redemption and it does not appear that there is any other judgment against her to get in ahead. Her suit to redeem cannot be turned into an agency of collecting general debts from her. That would not be equitable, for it would introduce a contract made with a third person, foreign to that on which redemption is based and the result might defeat redemption if the plaintiff was unable to pay the judgment. As was well said by the trial justice in his opinion: "Had the plaintiff been made a party to the foreclosure and offered to redeem before the sale, she could not have been required to pay as a condition of such redemption a deficiency judgment obtained on another foreclosure relating to other property.". It was not owing to her mistake that she was not made a party and she should not be required to pay more now, taxes and interest excepted, than she would if the foreclosure action had been regular and she had redeemed therein. As we bound the relief in her favor by the rule of equity, we must limit the relief against her by the same rule.

The judgment of the Appellate Division should be modified by striking out the provision "requiring the plaintiff to pay the judgment of $1,019.48 if redemption is had, or in the alternative deducting the amount of the judgment from the sum to be paid by the defendant," and also the provision allowing costs to the defendant, the Fidelity Trust Company and, as thus modified, affirmed, without costs to either party in either court. The appeal from the intermediate order should be dismissed, without costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment accordingly.

NORA O'CONNOR, Appellant, *v.* PATRICK HENDRICK, as Trustee of School District No. 9, Town of Lima, Livingston County, et al., Respondents.

1. SCHOOLS — AUTHORITY OF SUPERINTENDENT OF PUBLIC INSTRUCTION TO REGULATE MANAGEMENT. While under the Consolidated School Law (L. 1894, ch. 556) the state superintendent of public instruction had no express authority to establish regulations as to the management of the public schools, such authority was clearly implied therein, the validity of such regulations depending upon whether or not they were reasonable, were consonant with the general purpose of the statute and were not inconsistent with the laws and policy of the state.

2. REGULATION AS TO USE OF RELIGIOUS DRESS BY TEACHERS. A regulation established by such superintendent prohibiting teachers in public schools from wearing a distinctly religious garb while engaged in the work of teaching therein, is a reasonable and valid exercise of the power conferred upon him, not because the wearers of such apparel should be excluded from teaching in the public schools on account of their religious convictions or membership in religious orders, since, if otherwise qualified and by their acts as teachers they do not promote any denominational doctrine or tenet, there is no reason, morally or legally, why they should be disqualified, but because the influence of such apparel is distinctly sectarian, even if the wearing of it does not amount to the teaching of denominational doctrine, and the prohibition is in accord with the public policy of the state as declared in the Constitution (Const. art. 9, § 4), forbidding the use of the property or credit of the state in aid of sectarian influences.

3. REFUSAL TO COMPLY WITH REGULATION FORFEITS SALARY. A refusal by teachers employed in a public school to comply with such regulation after notification thereof, forfeits their right to further compensation under their contract of employment, since one of the implied obligations of such contract is to obey all reasonable regulations as to the management of the school made by the superintendent, and, therefore, a contention that he had no power to annul it is without force.

O'Connor v. *Hendrick*, 109 App. Div. 361, affirmed.

(Argued March 20, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 7, 1905, affirming a judgment in favor of defendants entered upon a decision of the court at a Trial Term without a jury.

The plaintiff and Elizabeth E. Dowd, being teachers duly licensed to teach in the common schools of this state, entered into contracts with the board of trustees of school district No. 9, in the town of Lima, county of Livingston, in the autumn of 1902, to teach in the public school of said district for a term of thirty-six consecutive weeks at a specified rate of compensation. While so engaged in teaching they wore the distinctive dress or costume of a religious society connected with the Roman Catholic church, of which they were members, which society is known as the Order of the Sisterhood of St. Joseph. On May 28th, 1903, the state superintendent of public instruction promulgated a decision made by him upon an appeal under the Consolidated School Law (Laws of 1894, chapter 556, title XIV), in which he declared that the wearing of an unusual dress or garb, worn exclusively by members of one religious denomination for the purpose of indicating membership in that denomination, by the teachers in the public schools during school hours while teaching therein, constitutes a sectarian influence and the teaching of a denominational tenet or doctrine which ought not to be persisted in. The decision further declared it to be the duty of the school authorities to require such teachers to discontinue the wearing of such dress or garb while in the public school room and in the performance of their duties as teachers therein, and it directed Patrick Hendrick, one of the defendants herein, as sole trustee of school district No. 9, in the town of Lima, Livingston county, to notify the plaintiff and Elizabeth E. Dowd forthwith to discontinue, during the school hours of each school day, the wearing of the distinctive dress of the sisterhood to which they belonged, and commanded him to dismiss them if they refused to comply with this requirement. On May 29th, 1903, the said Patrick Hendrick notified the plaintiff and Elizabeth E. Dowd of the contents of the decision. Notwithstanding this notification they continued to teach school wearing the prohibited garb up to June 19th, 1903, which was the end of the school year. Mr. Hendrick, the school trustee, does not appear to have made any effort to

remove or dismiss them. The present action was brought against him by the plaintiff in her own behalf and as assignee of the claim of Elizabeth E. Dowd, to recover a balance of $79.20 alleged to be due under their contracts with the school district. Mr. Hendrick defended on the ground that the plaintiff and her assignor had lost all right to recover anything under their contracts by reason of the fact that they had continued to wear the distinctive costume of the religious sisterhood to which they belonged, while engaged in teaching, after they had received notice of the aforesaid decision of the state superintendent of public instruction. The other defendants, who were taxpayers allowed to intervene at their own instance, also interposed an answer setting up a similar defense. The case was tried by consent without a jury before a justice of the Supreme Court who held that the plaintiff was entitled to recover $25.20, being the amount of the compensation of the two teachers which had been earned, but not paid, prior to the time when they were notified of the superintendent's decision. He held, however, that the plaintiff and her assignor were not entitled to recover for any services rendered during the three weeks in which they continued to teach after the decision of the superintendent had been brought to their attention.

From the judgment rendered at the Trial Term, the plaintiff appealed to the Appellate Division, where that judgment has been affirmed by a divided court.

John D. Lynn and *Timothy J. Nighan* for appellant. The court erred in deciding that the decision of the state superintendent was a defense to plaintiff's cause of action or any portion of it. (*Lawrence* v. *Hunt*, 10 Wend. 80; *Ward* v. *Boyce*, 152 N. Y. 200; *Golpin* v. *Page*, 18 Wall. 350; *Yick Wo* v. *Hopkins*, 118 U. S. 356.) The superintendent has no authority in his judicial capacity to try or decide matters arising under section 4, article 9 of the Constitution, (*Light* v. *Skinner*, 159 N. Y. 167.) In the absence of authority actually conferred upon the superintendent of public instruc

tion by law, he cannot by implication exercise powers which in effect give him the right to annul a valid contract and deprive the parties of the benefit of it, and do this by mere arbitrary action exempt from review in any court. (*Ringlander* v. *Star Co.*, 98 App. Div. 105.) The facts before this court will not sustain the conclusion that the wearing of the apparel worn by these teachers constitutes the teaching of a denominational tenet or doctrine within the prohibition of the Constitution. (*Newell* v. *People*, 7 N. Y. 9; *People* v. *Rathbone*, 145 N. Y. 434; *Hysong* v. *School Board*, 164 Penn. St. 629.)

Fletcher C. Peck for Patrick Hendrick as trustee, respondent. The superintendent of public instruction had the power to make the decision and order in question, and the plaintiff and her assignor were bound by the directions and conditions contained in said order. (*People ex rel. Bowers* v. *Allen*, 19 Misc. Rep. 464; *People ex rel. Light* v. *Skinner*, 159 N. Y. 167; *People ex rel. Underhill* v. *Skinner*, 74 App. Div. 58; *People ex rel. Yale* v. *Eckler*, 19 Hun, 609; *People ex rel. Clingan* v. *Draper*, 63 Hun, 389.) When the plaintiff and her assignor made these contracts in question they impliedly agreed as teachers to observe the orders and regulations which had been made by the superintendent of public instruction or which he might thereafter make, controlling the management and discipline of the public schools. (*Jemison* v. *C. S. Bank*, 122 N. Y. 135.)

Walter H. Knapp and *Albert H. Stearns* for Charles D. Miner et al., respondents. The decisions of the superintendent of public instruction that no teacher shall wear the distinctive and distinguishing dress or garb denoting membership in a religious order in public schools while teaching are a bar to the plaintiff's recovery. (*Rockefeller* v. *Taylor*, 69 App. Div. 185; Smith Modern Law of Municipalities, § 252; *McDonald* v. *Mayor*, 68 N. Y. 24.) The superintendent of public instruction had jurisdiction and authority to make the

decisions. (*People* v. *Schuyler*, 4 N. Y. 173; *People* v. *Allen*, 19 Misc. Rep. 464; *Clark* v. *Tunnicliffe*, 38 N. Y. 58; *Ex parte Bennett*, 3 Den. 177; *People ex rel. Clingan* v. *Draper*, 63 Hun, 389.) The decision of the superintendent of public instruction is final and conclusive and is binding upon this court. (*People* v. *Allen*, 19 Misc. Rep. 464; *Clark* v. *Tunnicliffe*, 38 N. Y. 58; *Ex parte Bennett*, 3 Den. 172; *People ex rel. Clingan* v. *Draper*, 63 Hun, 389; *Hutchinson* v. *Skinner*, 21 Misc. Rep. 729; *Yale* v. *Eckler*, 19 Hun, 609; *Steinson* v. *Board of Education*, 49 App. Div. 148; *Parke* v. *Independent School District*, 65 Iowa, 209; *Wood* v. *Farmer*, 69 Iowa, 533; *Thompson* v. *Board of Education*, 57 N. J. L. 628.) The decision of the superintendent of public instruction was binding upon the plaintiff and her assignor, although not made in name of parties to the appeal. (*City of Buffalo* v. *N. Y., L. E. & W. R. R. Co.*, 152 N. Y. 276; *Kittenger* v. *B. T. Co.*, 160 N. Y. 377; *United States* v. *Ju Toy*, 198 U. S. 644.) The regulation contained in the decisions was a proper one for the superintendent of public instruction to make and is consistent with the school policy of this state. (*People* v. *Bd. of Education*, 13 Barb. 411.)

WILLARD BARTLETT, J. The real question in this case is whether the plaintiff and the plaintiff's assignor lost their right to any further compensation under their contract of service as teachers, by reason of their refusal to comply with a regulation established by the state superintendent of public instruction which in effect prohibited teachers from wearing a distinctive religious garb while engaged in the work of teaching.

The order made by the superintendent on the subject was in form the decision of an appeal. The Consolidated School Law as then in force provided for certain appeals to the state superintendent of public instruction by any person conceiving himself aggrieved in consequence of any decision made by various officers, including a decision by the trustees of any district in paying any teacher. (Laws of 1894, chapter

556, title XIV, section 1.) One Alfred K. Bates prosecuted an appeal under the statute to review the action of Patrick Hendrick as school trustee of school district No. 9, in the town of Lima, in employing the plaintiff and Elizabeth E. Dowd as teachers, and allowing them to teach while wearing the distinctive dress of the Roman Catholic religious order known as the Sisterhood of St. Joseph, and it was upon this appeal that the superintendent promulgated the order prohibiting teachers from wearing the costume in question while engaged in the actual work of teaching. Neither the plaintiff nor Elizabeth E. Dowd was a party to the proceedings thus brought before the superintendent, nor does it appear that they had any knowledge of it while it was pending. It is plain, therefore, that it could have had no effect upon their rights considered as a judicial decision or prior adjudication. It seems to me, however, that it may be and should be viewed in another light, and if thus regarded, that it constituted a rule of conduct which the plaintiff and her fellow-teacher were bound to obey. Although a decision in form, it was in fact a regulation in regard to the management of the common schools which the superintendent had the right to establish, provided only that it was reasonable in its character and not in conflict with the laws of the state or public policy.

While it is true that there is no express grant of authority to the state superintendent of public instruction (now the commissioner of education under the Unification Act, chapter 40 of the Laws of 1904) in the Consolidated School Law to establish regulations as to the management of the common schools, the existence of a general power of supervision on his part over such schools is clearly implied in many parts of the statute.

Among other things, he was required, so far as he could consistently with his other duties, to visit such of the common schools as he saw fit, and inquire into their course of instruction, management and discipline, and advise and encourage the pupils, teachers and officers thereof (Consolidated School Law, Laws of 1894, chapter 556, title 1, section 8).

The statute further prescribed that he should submit to the legislature an annual report containing among other things "a statement of the condition of the common schools of the state, and of all other schools and institutions *under his supervision*, and subject to his visitation as superintendent." (Idem, title 1, section 9, subdivision 1.)

It also gave him the power to remove any school commissioner or other school officer whenever it should be proved to his satisfaction that any such school commissioner had been guilty of any willful violation or neglect of duty under the statute or of "willfully disobeying any decision, order or *regulation*" of the superintendent. (Idem, title 1, section 13.)

The authority to remove an officer for the willful disobedience of a regulation of the superintendent necessarily implies a power on the part of the superintendent to make regulations; and as has already been suggested, if the superintendent possessed the power to establish regulations in regard to the management of the common schools, the courts will not pronounce such regulations invalid unless they are unlawful or unreasonable. In arriving at a determination as to its validity a regulation in reference to the management of the common schools established by an officer under statutory authority is to be tested by rules similar to those which would apply in the case of a municipal ordinance, as to which the rule is that "ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state." (1 Dillon's Municipal Corporations [4th edition], section 319.) The rule which seems to be applicable here was enunciated and applied by the Supreme Court of Illinois in the case of *Rulison* v. *Post* (79 Ill. 567), where the statutory duties of school directors were under consideration, and it was said: "In the performance of their duty in carrying the law into effect, the directors may prescribe proper rules and regulations for the government of the schools of their district, and enforce them. They may, no doubt, classify the scholars, regulate their studies and their

deportment, the hours to be taught, besides the performance of other duties necessary to promote the success and secure the well-being of such schools. But all such rules and regulations must be reasonable, and calculated to promote the objects of the law — the conferring of such an education upon all, free of charge." Another case involving a similar question is *Trustees of Schools* v. *People* (87 Ill. 303), where it was held that a regulation by school trustees excluding a pupil from a high school because his father did not wish him to study grammar therein was arbitrary and unreasonable and could not be enforced.

We are thus brought to the question whether in this state a regulation is to be deemed unreasonable which prohibits teachers in the common schools from wearing a distinctively religious garb while engaged in the work of teaching. In my opinion it cannot justly be so regarded. "Neither the State," says the Constitution, "nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." (Constitution, art. IX, section 4.) Here we have the plainest possible declaration of the public policy of the state as opposed to the prevalence of sectarian influences in the public schools. The regulation established by the state superintendent of public instruction through the agency of his order in the Bates appeal is in accord with the public policy thus evidenced by the fundamental law. There can be little doubt that the effect of the costume worn by these Sisters of St. Joseph at all times in the presence of their pupils would be to inspire respect if not sympathy for the religious denomination to which they so manifestly belong. To this extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine. A different view was taken by the Supreme Court of Pennsylvania in the case of *Hysong*

v. *School District* (164 Pa. St. 629, 654) where it was held that school districts might employ as teachers sisters of a religious order of the Roman Catholic Church, and permit them while teaching to wear the garb of their order provided no religious sectarian instruction should be given, nor any religious sectarian exercises engaged in. There was a dissenting opinion in that case, however, strongly reasoned in support of the conclusion that a school conducted similarly to that in the case at bar was in effect dominated by sectarian influence. The teachers, said Mr. Justice WILLIAMS in this dissenting opinion, "come into the schools not as common school teachers or as civilians, but as the representatives of a particular order in a particular church whose lives have been dedicated to religious work under the direction of that church. Now the point of the objection is not that their religion disqualifies them. It does not. Nor is it thought that church membership disqualifies them. It does not. It is not that holding an ecclesiastical office or position disqualifies, for it does not. It is the introduction into the schools as teachers of persons who are by their striking and distinctive ecclesiastical robes necessarily and constantly asserting their membership in a particular church, and in a religious order within that church, and the subjection of their lives to the direction and control of its officers."

As to the reasonableness of the regulation prohibiting the use of a distinctive religious garb by teachers in the common schools, some other considerations may be mentioned. It must be conceded that some control over the habiliments of teachers is essential to the proper conduct of such schools. Thus, grotesque vagaries in costume could not be permitted without being destructive of good order and discipline. So, also, it would be manifestly proper to prohibit the wearing of badges calculated on particular occasions to constitute cause of offense to a considerable number of pupils, as, for example, the display of orange ribbons in a public school in a Roman Catholic community on the 12th of July. It is suggested in the brief of the learned counsel for the appellant that if the

state superintendent could order these teachers to refrain from wearing their distinctive religious costumes he could just as lawfully direct them to don a dress of any other pattern or to compel a teacher to remove a gown because it was too plain or too gay, or that he might order the principal to cut off his beard or color his moustache. The obvious answer to these suggestions and others of a similar character is that no regulation would be valid which was manifestly unreasonable, because it would then be unauthorized by law.

The views which have already been expressed substantially dispose of all the points argued in behalf of the appellant as well as those suggested in the dissenting opinion below except the proposition that the state superintendent had no right to annul a valid contract between a teacher and the school district by which she was employed. The proposition is correct, but it has no application in the present case, because a contract between the trustees and the teacher of a common school is, by implication, subject to the power of the superintendent to make reasonable regulations as to the management of the school. This being the case, the superintendent does not annul a valid contract by insisting that such reasonable regulations shall be observed, for by entering into the contract the teacher assumes the implied obligation to obey such regulations.

It follows that the judgment appealed from should be affirmed, with costs. In reaching this result, however, I do not wish to be understood as acquiescing in that part of the opinion below in which it is asserted that "these sisters should never be permitted to teach in our public schools." There is no reason either in morals or in law why they or any other qualified persons should not be allowed thus to teach, whatever may be their religious convictions, provided that they do not by their acts as teachers promote any denominational doctrine or tenet.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ALBERT J. HATCH, Appellant, *v.* EDWARD REARDON, a Peace Officer of the County of New York, Respondent.

1. STOCK TRANSFER TAX ACT — CONSTITUTIONAL REQUIREMENT AS TO PASSAGE OF LAWS — CONST. ART. 3, § 15. The Stock Transfer Tax Act (L. 1905, ch. 241), alleged to be unconstitutional as having been passed without an emergency message before it had been on the desks of the members of the legislature in its final form for at least three calendar legislative days prior to its final passage, as required by section 15, article 3 of the Constitution, is not invalid for that reason, where it appears that the bill originated in the senate, lay on the desks of its members for three calendar legislative days in its final printed form, and also, in accordance with legislative practice, upon the desks of the members of the assembly during the same period and in the same form, was passed by the senate, and the second day thereafter by the assembly. The word "members," as used in the constitutional provision, means members of the legislature as an entity, not members of the senate and assembly merely as such; it is not necessary that the members of the house in which a bill originates must first have it on their desks for three days, and after its passage by them the members of the other house must have it on their desks three more days, before they can pass it; the constitutional requirements are met, when a bill has been upon the desks of the members of each house, in its final form, for at least three calendar legislative days, whether simultaneously or otherwise.

2. VALIDITY OF TAXATION OF TRANSFER OF PARTICULAR CLASS OF PROPERTY ONLY. The act imposes a tax, not upon property, but upon its transfer, and being uniform in its operation upon all transfers of the class named and upon all persons making such transfers within the state, is not obnoxious to the State or Federal Constitution as being so arbitrary, discriminating and unreasonable in taxing the transfer of one class of property only, as to deprive certain persons of their property without due process of law, and denying to them the equal protection of the laws.

3. VALIDITY OF TAX THOUGH NOT BASED UPON VALUES. The tax imposed by the act being an excise tax imposed upon the transfer of a particular class of property does not depend upon any principle of valuation or any notice to the taxpayer; it is not a direct tax governed by the rule of appraisement but an indirect tax governed by the rule of uniformity: where there is no sale there is no tax: when there is a sale, the tax follows, which the legislature had the right to apportion in its discretion; it is valid, therefore, although not based upon the value of the certificates sold or of the sum for which they are sold.

4. TAXATION OF TRANSFERS MADE BY NON-RESIDENTS OF STOCK ISSUED BY FOREIGN CORPORATIONS VALID WHETHER TAX IS CONSIDERED AN EXCISE OR A PROPERTY TAX. The fact, that transfers made within the state by non-residents of certificates issued by foreign corporations and owned by such non-residents are subject to the tax, does not constitute it a tax upon property without the jurisdiction of the state; regarded as a tax not upon property but upon the privilege of its transfer, the state has the right to tax all business done and all contracts made within its territory, although relating to property situated elsewhere, provided they are not protected as federal agencies, whether the business is done or the contracts are made by residents or non-residents; assuming, however, that the tax is in effect a tax upon property, the certificates may, for the purposes of taxation, be treated as property, and when found here are within the jurisdiction of the state and subject to the tax, so that whether regarded as a tax on the transfer of or upon the certificates themselves, it affects neither persons nor property without the jurisdiction of the state.

5. VALIDITY NOT AFFECTED BY INTERSTATE COMMERCE CLAUSE OF FEDERAL CONSTITUTION. The act does not violate the commerce clause of the Federal Constitution because it taxes transfers of certificates of stock in foreign corporations made by non-residents in this state; the tax is uniform, is upon the privilege of transferring within this state certificates of stock in all corporations, domestic or foreign, whether the transfers are made by citizens or non-residents; the fact that the certificates represent property situated in another jurisdiction is immaterial, and this would be true if it were a property tax. Interstate commerce means the exchange of property in one state for property in another state; where the certificates and the consideration received are here there is no transportation of either from another state, and there can be no movement of the property represented by such certificates; the tax, therefore, does not directly infringe upon interstate commerce. Assuming, however, that it is an indirect restraint thereon, in that it tends to prevent freedom of commercial intercourse, if there is no discrimination against persons or property from other states, that does not constitute such a substantial interference with interstate commerce as to amount to a state regulation thereof. State legislation which treats all persons, all property and all transfers of the same class in the same way under the same circumstances, and which does not directly or materially touch interstate commerce, does not violate the commerce clause of the Federal Constitution.

The authorities, relating to the points decided, collated and fully discussed.

People ex rel. Hatch v. *Reardon*, 110 App. Div. 821, affirmed.

(Argued March 5, 1906; decided April 17, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered Feb-

ruary 1, 1906, which affirmed an order of Special Term dismissing a writ of habeas corpus and remanding the relator to custody.

On the 8th of June, 1905, the relator was arrested under a warrant issued by a justice of the Court of Special Sessions of the city of New York, charging him with the commission of a misdemeanor in that on the 7th of June, 1905, at the city of New York, he violated chapter 241 of the Laws of 1905 "by the sale and delivery of certain shares of stock of certain railroad corporations without making any bill or memorandum of such sale, or affixing any stamp or stamps to such a bill or memorandum, or in any way paying the tax as required by said act."

The complaint was made by a resident of the state of Connecticut against the relator, who is also a resident of that state. In his affidavit for the warrant the complainant swore that he was a broker by occupation and carried on that business at number 20 Broad street in the city of New York; that in said city, on the day named, the relator sold him "100 shares of the common capital stock of the Southern Railway Company, a corporation organized under and by virtue of the laws of the state of Virginia and owning and operating a system of railroads situated wholly without the state of New York, of the par value of $100 per share, for the sum of $30.75 per share in cash, that being the then market value of said shares, and 100 shares of the common capital stock of the Chicago, Milwaukee and St. Paul Railroad Company, a corporation organized under the laws of the state of Wisconsin, and owning and operating a system of railroads situated wholly without the state of New York, of the par value of $100 per share, for the sum of $172 per share, that being the then market value of said shares." On payment of the purchase price, amounting to $20,275, the relator delivered to the complainant two certificates of stock representing such shares, assigned in blank, "without affixing to any bill or memorandum thereof, or to any other paper, any stamp or stamps, and without paying any tax on making such sale and delivery,

although requested by deponent so to do, in violation of the provisions" of said act.

It did not appear when, by whom, from what place, or for what purpose, either certificate was brought into this state, or that it was brought here at all. The history of the certificates, so far as given, is simply that they were in the city of New York on the day named, and that they were then and there sold and delivered by the relator to the complainant.

A writ of habeas corpus issued to test the validity of said statute was dismissed by the justice of the Supreme Court before whom it was returnable and the usual order remanding to custody was made. Upon appeal to the Appellate Division the order was affirmed, one of the justices dissenting, and the relator appealed to this court.

John G. Milburn and *John F. Dillon* for appellant. The act is, because of its arbitrary and discriminating character and operation, a violation of the fundamental principles of the taxing power and a taking of property without due process of law, contrary to the Constitution of the state and of the United States, and it denies to holders of the stock of corporations the equal protection of the laws in violation of the fourteenth amendment to the Federal Constitution. (*Loan Assn.* v. *Topeka*, 20 Wall. 663; *State* v. *Switzerland*, 143 Mo. 287; Cooley on Taxn. [3d ed.] 72; *L. F. Co.* v. *Kentucky*, 188 U. S. 385; *U. T. Co.* v. *Kentucky*, 199 U. S. 194; *Genet* v. *City of Brooklyn*, 99 N. Y. 296; *People* v. *E. T. Co.*, 96 N. Y. 387; *Matter of McPherson*, 104 N. Y. 317; *Matter of Pell*, 171 N. Y. 48; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Claybrook* v. *Owensboro*, 16 Fed. Rep. 297.) The act is invalid because it arbitrarily fixes the amount of the tax regardless of the value of the shares sold or the sum for which they are sold. (*B. G. R. R. Co.* v. *Penn.*, 134 U. S. 232; *Jennings* v. *C. R. Co.*, 147 U. S. 147.) The act is invalid because in imposing a tax on sales of the shares of a foreign corporation owned by non-residents it is virtually a tax on property without the jurisdiction of the

state. (*State Tax on Foreign Held Bonds*, 15 Wall. 300; *Delaware Railroad Tax*, 18 Wall. 206; *People* v. *E. T. Co.*, 96 N. Y. 387; *U. T. Co.* v. *Kentucky*, 199 U. S. 194; *People* v. *Coleman*, 126 N. Y. 437; *Flynn* v. *Brooklyn City R. R. Co.*, 158 N. Y. 504; *Matter of Euston*, 113 N. Y. 181; *Matter of James*, 144 N. Y. 12; *Matter of Bronson*, 150 N. Y. 1; *Plymton* v. *Bigelow*, 93 N. Y. 592.) This tax law is void under the commerce clause of the United States Constitution because it taxes any sale within the state of New York of stock in a foreign corporation, though such stock belongs to a person not a resident of the state of New York, and such sale is made by such non-resident. (*Matter of Euston*, 113 N. Y. 174; *Jellinik* v. *H. C. M. Co.*, 177 U. S. 1; *Robbins* v. *S. C. T. District*, 120 U. S. 489; *Corson* v. *Maryland*, 120 U. S. 502; *Asher* v. *Texas*, 128 U. S. 129; *Stockard* v. *Morgan*, 185 U. S. 27; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419; *Hopkins* v. *U. S.*, 171 U. S. 578; *Henderson* v. *Mayor, etc.*, 92 U. S. 259.) The statute in question was not passed by the assembly in accordance with section 15 of article 3 of the Constitution of the state of New York in this, to wit: That no bill was introduced into that body or sent from the senate into that body until April 4, 1905, one day before its final passage by that body April 5, 1905, and, therefore, the assembly did not comply with said section 15 of the Constitution. (*Thomas* v. *R. R. Co.*, 101 U. S. 71; *People* v. *Supervisors*, 8 N. Y. 317.)

Julius M. Mayer, Attorney-General (*John R. Dos Passos* of counsel), for respondent. The act is not "arbitrary and discriminating" in its character and operation, and does not violate "the fundamental principles of the taxing power," which we must assume is only a way of stating that it takes appellant's property "without due process of law," against the Federal and State Constitutions, and denies to the holders of the stock of corporations "the equal protection of the laws," in violation of the 14th amendment to the Constitution

of the United States. (*Knowlton* v. *Moore*, 178 U. S. 60; *Thomas* v. *U. S.*, 192 U. S. 363; *Nicol* v. *Ames*, 173 U. S. 509; *P. Ins. Co.* v. *Soule*, 7 Wall. 445; *Auer* v. *Washington Mills*, 11 Allen, 274; *Coulter* v. *L. & N. R. R. Co.*, 196 U. S. 599; *Matter of Prime*, 137 N. Y. 354; *Matter of McPherson*, 104 N. Y. 317; *Matter of Romaine*, 127 N. Y. 80; *Matter of Whiting*, 150 N. Y. 29.) The act neither creates discrimination nor produces confiscation of property, under the Constitution of New York or of the United States, or under the 14th amendment. (*H. B. Co.* v. *Henderson City*, 173 U. S. 592; *Nicol* v. *Ames*, 173 U. S. 518; *Matter of Whitney*, 150 N. Y. 30; *T. Ins. Co.* v. *Connecticut*, 185 U. S. 371; *Matter of McPherson*, 104 N. Y. 316; *Magoun* v. *I. T. & S. Bank*, 170 U. S. 293; *G. R. R. Co.* v. *Penn.*, 134 U. S. 232; *People* v. *H. Ins. Co.*, 92 N. Y. 337.) The law does not violate the commerce clause of the Constitution either between the states or as to foreign nations. (*Tinsley* v. *Anderson*, 171 U. S. 101; *Nicol* v. *Ames*, 173 U. S. 521; *Passenger Cases*, 7 How. [U. S.] 283; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *S. Society* v. *Multnomah Co.*, 169 U. S. 421; *New Orleans* v. *Stempel*, 175 U. S. 309; *D. R. R. Tax*, 18 Wall. 206; *S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *V. & C. R. R. Co.* v. *V. C. R. R. Co.*, 63 Vt. 119; *People ex rel. C. C. Co.* v. *Morgan*, 178 N. Y. 439.)

William Travers Jerome, *District Attorney* (*E. Crosby Kindleberger* of counsel), for respondent. The act was properly passed. (Const. of N. Y. art. 3, § 15.) The tax was not one on property but on the exercise of a privilege. (*City of New York* v. *McLean*, 170 N. Y. 374; *Matter of McPherson*, 104 N. Y. 306; *Thomas* v. *U. S.*, 115 Fed. Rep. 207; 192 U. S. 363; *Orr* v. *Gilman*, 183 U. S. 329; *Clark* v. *Titusville*, 184 U. S. 329; *Cook* v. *Marshall Co.*, 196 U. S. 261; *Kehrer* v. *Stewart*, 197 U. S. 60; *French* v. *B. A. P. Co.*, 181 U. S. 324; *Cook* v. *Penn.*, 97 U. S. 566; *Brown* v. *Maryland*, 12 Wheat. 419.) The state had jurisdiction,

notwithstanding the fact that the shares transferred were those of foreign corporations. (*H. L. Ins. Co.* v. *N. Y.*, 134 U. S. 594; 92 N. Y. 328; *N. Y.* v. *Roberts*, 171 U. S. 658; *Matter of Palmer*, 183 N. Y. 328; *People* v. *Comrs.*, 4 Wall. 258; *Simpson* v. *J. C. C. Co.*, 165 N. Y. 193; *Kidd* v. *Alabama*, 188 U. S. 730; *U. T. Co.* v. *Kentucky*, 199 U. S. 194.) The act is not objectionable as depriving any person of his property without due process of law. (*Hagar* v. *Reclamation District*, 111 U. S. 701; *B. G. R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *U. S.* v. *Thomas*, 115 Fed. Rep. 207; 192 U. S. 363.) The Stock Transfer Act does not constitute a denial of the equal protection of the laws. (*B. G. R. R. Co.* v. *Penn.*, 134 U. S. 232; *Wright* v. *Hart*, 182 N. Y. 330; *K. R. R. Tax Case*, 115 U. S. 321; *P. E. Co.* v. *Siebert*, 142 U. S. 339; *W. & S. P. Co.* v. *Minn.*, 159 U. S. 526; *A. E. Co.* v. *Ohio*, 165 U. S. 195; *Magoun* v. *I. T. & S. Bank*, 170 U. S. 283; *Nicol* v. *Ames*, 173 U. S. 509; *A. S. R. Co.* v. *La.*, 179 U. S. 89; *Connolly* v. *U. S. P. Co.*, 184 U. S. 562.) The act is not in violation of the commerce clause of the Federal Constitution. (*Woodruff* v. *Parham*, 8 Wall. 123; *A. S. & W. Co.* v. *Speed*, 192 U. S. 520; *Kehrer* v. *Stewart*, 197 U. S. 60; *A. P. Co.* v. *Lacy*, 200 U. S. 226.)

VANN, J. The issue of law joined by the petition, return and reply is whether the legislature had power to enact, and did in fact enact, chapter 241 of the Laws of 1905, which provides for a tax on the sale and transfer of stock certificates. That act is part of the Tax Law, which it amends by adding a new article known as number fifteen. It imposes a tax "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, 1905," of two cents "on each hundred dollars of face value or fraction thereof." Payment of the tax must be denoted by an adhesive stamp or stamps affixed in a manner adapted to the circumstances of the sale.

A violation of the act by a transfer without payment of the tax is made a misdemeanor and may be punished by fine, or imprisonment, or both, and the offender is also subject to "a civil penalty of five hundred dollars for each violation," to be recovered by the state comptroller in any court of competent jurisdiction. The statute further provides that no transfer of stock without payment of the tax "shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state." The taxes thus imposed "and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon."

The act is attacked as invalid on the ground that it was prematurely passed before it had been on the desks of the members of the legislature in its final form for at least three calendar legislative days prior to its final passage, as required by section 15, article 3 of the Constitution; that it makes an improper classification; that the tax is imposed on a wrong basis; that it is imposed upon property without the state, and that the act violates the commerce clause of the Federal Constitution.

After carefully considering these objections, we have reached the conclusion that they are not well founded and the following are our reasons, so far as we have found time to express them:

First. The statute in question originated, as a bill, in the senate, where it was amended from time to time and reprinted as often as it was amended. Printed copies thereof, as it was when introduced and as it was each time after it was amended, were promptly placed on the desks of the members of both houses when it was introduced and after each amendment. This was not required by any written rule of the legislature but was in accordance with the general practice that has prevailed since the Constitution of 1894 was adopted. The bill was passed by the senate on the third of April, 1905, was sent to the assembly for its concurrence on the fourth and was

finally passed by that body on the fifth, neither the governor nor the acting governor having certified to the necessity of its immediate passage. The journal of the assembly states that the bill was "printed and on the desks of the members in its final form at least three calendar legislative days prior to its final passage." These are, in substance, the facts relating to the subject as alleged in the petition for the writ and not denied in the return.

The Constitution provides that "No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the Governor, or the acting Governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the State." (Const. art. 3, § 15.)

The object of this provision, which first appeared in the Constitution of 1894, is to prevent hasty and careless legislation, to prohibit amendments at the last moment and to secure more publicity than had been required before. Care was taken to provide for emergencies by a certificate of necessity from the governor, which authorizes immediate action. The requirement is not directory, but mandatory, as is obvious from the form of the command, which prohibits a bill from becoming a law without compliance therewith. The question is, who are meant by "the members" upon whose desks the printed bill is to be placed? Does the provision mean that the members of the legislature are to have the bill on their desks for three days prior to its final passage, which was the fact in the instance before us; or that the members of the house in which it originated must first have it on their desks for three days, and after they have passed it the members of the other house must have it on their desks for three days more before they can pass it? If the latter is the true meaning of the requirement, it was not obeyed, for the bill was passed by the assembly on the second day after it was passed by the senate.

The Constitution created the legislature as an entity, con-

sisting of two houses, the senate and assembly. In every article, except the last, which relates only to the date of operation, and in almost every section it recognizes the existence of the legislature, as such. Grants of power are made to the legislature and restrictions upon the exercise of power are directed to the legislature, not to the senate and assembly. Both senators and assemblymen are members of the legislature, and as such are required to take an oath of office. (Art. 13, § 1.) The command of the people is addressed to the legislature continuously throughout the fundamental law. Thus it provides that "no member of the Legislature shall receive any civil appointment within this State * * * during the time for which he shall have been elected," and that "no person shall be eligible to the Legislature" under certain circumstances (Art. 3, §§ 7 and 8); directs that "the members" shall not be questioned "for any speech or debate in either house of the Legislature" (Id. § 12); that senators and members of assembly shall be elected on a day named "unless otherwise directed by the Legislature" (Id. § 9); that "no private or local bill, which may be passed by the Legislature, shall embrace more than one subject" (Id. § 16); that "the Legislature shall not pass a private or local bill" in certain cases (Id. § 18); that "the Legislature shall neither audit nor allow any private claim or account against the State" (Id. § 19); that the governor may "convene the Legislature, or the Senate only, on extraordinary occasions," and shall "communicate by message to the Legislature" (Art. 4, § 4); speaks of "the final adjournment of the Legislature" (Id. § 9); "the Legislature at its next meeting" (Id. § 5), and the "next session of the Legislature" (Art. 5, § 7); authorizes the legislature to alter judicial districts and create judicial departments (Art. 6, §§ 1 and 2); prohibits "the Legislature" from selling certain canals (Art. 7, § 8), and from suspending specie payments (Art. 8, § 5); requires it to provide a system of free common schools (Art. 9, § 1); to provide for filling vacancies in office (Art. 10, § 5); to organize the militia (Art. 11, § 3); to incorporate cities and villages

(Art. 12, §§ 1, 2), and to submit proposed amendments to the people (Art. 14, § 1).

Many other sections, containing similar provisions, might be cited, but the foregoing are sufficient to show that while the senate and assembly are separate bodies, they constitute the legislature; that their united action becomes the act of the legislature and that the members of both houses are members of the legislature. A bill is the draft of a proposed statute submitted to the legislature for enactment. It cannot become a law by the action of the senate alone, or of the assembly alone, but only by the action of both, when it becomes an act of the legislature, subject to the approval of the governor. It may originate in either house and when introduced in either it is before the legislature, or else no bill can ever get before it, for each house is part of the legislature. When, therefore, the Constitution provides that no bill shall be passed unless it shall have been printed and upon the desks of "the members" in its final form for a certain period, it means the members of the legislature, not the members of the senate and assembly, merely as such. This is emphasized by the contrast in the form of the command when action is required by the members of each house separately, as in section twenty of article third relating to the requirement of "a two-third vote" upon a bill "appropriating the public moneys or property for local or private purposes." There the command is addressed "to the members elected to each branch of the Legislature," separately, instead of to the members of the legislature, collectively, which is the usual form. When the Constitution speaks of three calendar legislative days it means three calendar days of the legislature, or days when the legislature is in session. It does not mean six days, which the construction contended for would involve. The bill in its final form, that is in the form in which it becomes a law, must be on the desks of all members of both houses for three days before it is passed by either. But one occasion for placing it on the desks is named, not two separate occasions, the first confined to one house and the second to the other.

All members of the legislature are thus given notice of every bill when introduced into either house and when amended by either house. No reprinting is required as the bill goes from one house to the other unless it has been amended, and whenever amended it must be reprinted. Every member is informed at once of bills pending in either house, so that he can promptly study the proposed legislation, communicate with his constituents, note the comments of the press, observe the state of public opinion and appear before the committee to which the bill is referred in the house of its origin for the purpose of making suggestions before he is called upon to vote in his own house. It prevents artful and dangerous amendments just before the final vote, which was formerly a great evil. It has the same effect, so far as publicity and opportunity for deliberate consideration are concerned, as if every bill were introduced into each house at the same time. The construction thus indicated is reasonable and proper, for it follows the Constitution as written, complies with its spirit and fulfills its purpose. It is in accordance with the practical construction of every legislature that has been in session since the provision was adopted, and the constitutional debates show that this was the construction of the convention which adopted it. (Revised Records, 887, 917.)

We can give no heed to the criticism of counsel that there is no statute or written rule requiring bills to be placed on the desks of members, for it is not the province of the courts to direct the legislature how to do its work. It is sufficient for us that the Constitution requires each house "to keep a journal of its proceedings" and that the journal of the assembly, which may be consulted to support a statute, shows that the constitutional provision in question was complied with when the act before us was passed. (Art. 3, § 11.)

Second. The classification made by selecting one kind of property and taxing the transfer of that only, is assailed as so arbitrary, discriminating and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws.

All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation. (*People* v. *Home Ins. Co.*, 92 N. Y. 328, 347.) The right to tax is not granted by the Constitution but of necessity underlies it, because government could not exist or perform its functions without it. While it may be regulated and limited by the fundamental law, it exists "independently of it as a necessary attribute of sovereignty." (*People* v. *Adirondack Ry. Co.*, 160 N. Y. 225, 236.) "The power of taxation being legislative, all the incidents are within the control of the legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a district of assessment; the method of collection, and whether a tax shall be a charge upon both person and property, or only on the land, are matters within the discretion of the Legislature and in respect to which its determination is final." (*Genet* v. *City of Brooklyn*, 99 N. Y. 296, 306.)

"A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings." (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562; *Armour Packing Co.* v. *Lacey*, 200 U. S. 226, 235.)

"We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or denial of the full protection of the laws." (*Otis* v. *Parker*, 187 U. S. 606, 610.)

"The Legislature must decide when and how and for what

public purposes a tax shall be levied and must select the subjects of taxation." (1 Cooley on Taxation [3rd ed.], 255.)

There is no express restriction upon this power in our State Constitution and no implied restriction, except by the primary guaranties relating to life, liberty, property and due process of law. The same is true of the Federal Constitution except as to certain subjects of national interest under the control of Congress, such as imports, patent rights and agencies used to carry the powers of Congress into execution. Subject to these restraints, the legislature has supreme control of the power to tax, and its action, even if arbitrary, discriminating and unreasonable, is binding upon all persons and property within the boundaries of the state. The state retained all the power of legislation that it did not part with in adopting the Federal Constitution or consenting to the amendment thereof, and subject to that exception, it is as supreme as the British Parliament, which is restrained only by the custom of the realm and the conservatism of the people. Taxes upon the right of succession to property by will and intestate law, on special franchises and upon the sale of intoxicating liquors, are recent instances of the exercise of this power by the state through the selection of special subjects of taxation, involving the exemption of all others, each of which was attacked as in violation of both Constitutions, but all were sustained by the courts. The tariff and internal revenue laws show that the same power of selection has been exercised by Congress, and the Federal courts have uniformly upheld it. Indeed, the prototype of the statute before us was an act of Congress passed in 1898, known as the "War Revenue Act," imposing a stamp tax on sales, transfers and deliveries of stock certificates, which was sustained without dissent by the Circuit and Supreme Courts of the United States. (30 U. S. Stat. 448; *United States* v. *Thomas*, 115 Fed. Rep. 207; 192 U. S. 363.) A like tax on sales of merchandise, although expressly limited to those made at "any exchange or board of trade," leaving all other sales untouched, was also sustained, and the declaration made that "a sale at an exchange does form a proper

basis for a classification which excludes all sales made elsewhere from taxation." (*Nicol* v. *Ames*, 173 U. S. 509, 521.)

The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and Federal courts. The tax on tobacco, on oleomargarine and the like is not less arbitrary or discriminating than the tax in question. While a tax upon a particular house, or horse, or the houses or horses of a particular man, or on the sale thereof, would obviously invade a constitutional right, still a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the legislature. This is true of a tax on all houses with "more than one chimney," or "with more than one hearth-stone," or on all race-horses. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs. (*Matter of McPherson*, 104 N. Y. 306, 318; *Matter of Gould*, 156 N. Y. 423, 427.) The equal protection of the laws "only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances." (*Kentucky R. R. Cases*, 115 U. S. 321, 337.) Or, in other words, all persons must "be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." (*Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 293; *Hayes* v. *Missouri*, 120 U. S. 68; *Barbier* v. *Connolly*, 113 U. S. 27, 32.) "Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or

whether they reside in any particular locality or are scattered all over the state." (1 Cooley on Taxation [3rd ed.], 260.)

The tax in question is not imposed upon property, but on the transfer of a certain class of property, extensively bought and sold throughout the state. It does not discriminate between different kinds of stock, taxing the sale of some and leaving others untaxed, but treats all in the class alike. The class includes all sales of certificates issued by any domestic or foreign association, company or corporation. It is a large and comprehensive class, as is shown by the revenue produced, which amounts to five or six millions per annum. The sales affected are made chiefly for speculation which may have influenced the legislature in making the selection. The statute operates equally and uniformly upon all transfers of the class named when made by any person within the state. All persons who sell stocks are treated alike and all parts of the state are treated alike. It applies with equal force to all sales, whether in the city or country, in exchanges, offices or on the street, by farmers, mechanics, brokers and others. The classification violates neither Constitution.

Third. It is claimed that the statute is invalid because it fixes the amount of the tax regardless of the value of the certificates sold or of the sum for which they are sold.

The tax in question is an excise tax which need not depend upon any principle of valuation or on any notice to the taxpayer. It is not a direct tax governed by the rule of appraisement, but an indirect tax governed by the rule of uniformity. It is not like a general tax upon the bulk of property in the state which must be paid in any event, for if there is no sale there is no tax. Neither notice nor grievance day is required, for no valuation is made except by the statute itself, and there is no provision in either Constitution requiring such a tax to be laid on an *ad valorem* basis. There can be no tax without a sale, even if the property is of great value and is owned in every household. When a sale is made the tax follows, and the legislature had the right to measure it in any way that it saw fit.

A tax of two cents on every check, regardless of the amount for which it was drawn, and of five cents on a written contract, whether it covered a transaction involving hundreds or thousands, may be referred to as examples of what has been done without serious question in the imposition of excise taxes. A poll tax does not depend upon the income or earning capacity of the persons subjected to it. A tax on carriages, guns and watches does not rest on the value of the subjects taxed. They are counted, not appraised. (*Hylton* v. *United States*, 3 Dall. 171; *Bells Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237.) The same is true of an excise tax on legal process, domestic animals, avocations and the like of which there have been many instances during the history of the nation and the different states. Such powers of taxation, as was said in a late case, "have admittedly belonged to state and nation from the foundation of the government." (*Knowlton* v. *Moore*, 178 U. S. 41, 60.) "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes (not dependent on the extent of his business) and generally, specific taxes on things, or persons, or occupations. In such cases the legislature fixes its amount and that is the end of the matter. * * * No right of his is therefore invaded. Thus if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, there is nothing the owner can do which can affect the amount to be collected from him." (*Hagar* v. *Reclamation District*, 111 U. S. 701, 709.)

Convenience in doing business, the slight cost of collection and the necessity of preventing evasion are important considerations in laying an excise tax and the rule of counting rather than valuing is almost universally adopted, so that the citizen may know at once the amount of the tax and pay it by affixing the stamps required, which are permanent evidence of the sum paid. The statute itself in all such cases, as well as in the case under consideration, apportions the tax

and the power of apportionment is part of the power of taxation. As was said by this court many years ago: "The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is, therefore, unlimited, unless it be restrained as a part of the power of taxation. There is not, and since the original organization of the state government, there has not been any such constitutional limitation or restraint." (*People ex rel. Griffin* v. *Mayor etc., of Brooklyn*, 4 N. Y. 419, 427.) The highest Federal court sustained without hesitation an assessment upon the nominal or face value of bonds instead of upon their actual value, and also declared that absence of notice to the owners of the bonds was not a taking of the bondholder's property without due process of law. (*Bells Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Jennings* v. *Coal Ridge Improvement & Coal Co.*, 147 U. S. 147.) In the *Thomas* case, precisely as in the case before us, the tax was measured by "each hundred dollars of face value or fraction thereof." As our legislature has all the power of legislation with reference to taxation that the state has, of necessity it has as much power to classify and measure as belongs to Congress. Hence, this point as well as the last preceding, was involved and decided in the *Thomas* case even if no expression of consideration appears in the opinions (*United States* v. *Thomas*, 115 Fed. Rep. 207; 192 U. S. 363). We think that the apportionment, even when so unequal in result as it was in the two sales described in the affidavit of the complainant, is within the exclusive control of the legislature, with no power in the courts to interfere.

Fourth. It is insisted that a tax on the transfer of stock certificates issued by a foreign corporation and owned by a non-resident, although made within this state, is virtually a tax on property without the jurisdiction of the state.

This position is founded on the theory that the shares of capital stock of a corporation represent its property and if that property is not within the state the shares are not taxable

here unless the owner resides here. The tax, however, is not on property, but on the sale of property, or on a particular kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property.

The question is whether the state has jurisdiction to impose a tax on a certain class of contracts when made within its territorial limits? Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. The fiction of the common law, *mobilia sequuntur personam*, has no foundation in the Constitution and does not control the legislature, which rejects or adopts it at will as applied to the subject of taxation. When two citizens of Connecticut come into this state and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state, and is as binding on them as if they resided in the state. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract,

though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the state they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the state it is subject to taxation by the state. This necessarily follows from the power of the state over the subject of taxation. It has power to tax all property within its territory, all business done and all contracts made within that territory, provided they are not protected as Federal agencies, whether the property is owned or the business is done or the contracts are made by residents or non-residents. "It has never been questioned that the Legislature can impose a tax on all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers." (*Matter of McPherson*, 104 N. Y. 306, 317.)

We think such specific or excise taxes are laid upon privileges rather than on property. (*Orr* v. *Gilman*, 183 U. S. 278, 289; *Clark* v. *Titusville*, 184 U. S. 329; *Thomas* v. *United States*, 192 U. S. 363; *Foppiano* v. *Speed*, 199 U. S. 501, 520.) This was distinctly held in the *Thomas* case, and necessarily so held, for if a tax on certificates is a tax on property it is a direct tax requiring apportionment "among the several states * * * according to their respective numbers." (Art. 1, § 2, par. 3.) But, even assuming that a tax on the sale of property is, in effect, a tax on the property itself, what are certificates of stock and how may they be treated by the state for the purpose of taxation? They may be treated as property from the function they perform and the use that is made of them. They may well be regarded as a distinct species of property, for they now represent the bulk of property in the state and are the universal medium of transfer. As we said in a recent case: "The main use of certificates is for convenience of transfer, and they are treated by business men as property for all practical purposes. They

are sold in the market, transferred as collateral security to loans and are used in various ways as property. They pass by delivery from hand to hand, are the subject of larceny and are taxable generally in this State." (*Matter of Whiting*, 150 N. Y. 27, 30.) Although issued by a foreign corporation and owned by a non-resident, if they are found within the state they may be seized under a warrant of attachment. (*Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193.) Speaking of the nature of a share of stock, Mr. Justice NELSON declared it to be "a distinct, independent interest or property, held by the stockholder like any other property that may belong to him, and, of course, subject to like taxation." (*People* v. *Com'r*, 4 Wall. 244, 258.) And in another case it was said: "Shares of stock may be within a state and the property of the corporation outside of it." (*Kidd* v. *Alabama*, 188 U. S. 730, 733.)

It does not appear how long the certificates in question had been in the state, or that they were here for some temporary purpose when they were sold by the relator to the complainant. For aught that appears they had been here for years in the possession of the owner, or deposited for safekeeping and had a *situs* here, so that they were subject to taxation here. They may have been bought here by the relator on the day of sale, and up to that time they may have been owned and in the possession of a resident of the state for year after year. The state found them here, and the presumption, in the absence of evidence to the contrary, is that they were subject to taxation here. If, owing to special circumstances, they were not, it was incumbent upon the relator to prove the fact. The legislature had the right to treat them as property and make them property for the purpose of taxation the same as it treats a bank deposit as money, although in reality it is a debt. (*Matter of Houdayer*, 150 N. Y. 37; *Matter of Romaine*, 127 N. Y. 80, 88.) We think that the tax, whether it is regarded as a tax on the sale of stock certificates or on the certificates themselves, touched neither person nor property without the jurisdiction of the state.

Fifth. The final objection urged against the statute is that it violates the commerce clause of the Federal Constitution because it taxes the transfer of certificates of stock in a foreign corporation when made by a non-resident in this state.

The commerce clause provides that Congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." (Art. 1, § 8, par. 3.) The omission of Congress to exercise this power in any case is an expression of its will that the subject shall be left free from restrictions upon it by the states. (*Robbins* v. *Shelby County*, 120 U. S. 489.) Commerce is the commanding word in the simple but weighty sentence quoted from the Constitution. What is commerce? According to the derivation, history and use of the word it is the exchange of property and includes the usual agencies of communication and transportation employed to effect the exchange. Thus it extends to whatever is used to move the property involved and the persons engaged in making the contract. Interstate commerce, or commerce among the states, means the exchange of property in one state for property in another state. Its essential characteristic is that the property affected must be transported to some point without the state. There must be interstate movement of property. The telegraph cases do not conflict with this view, for the telegraph practically transports either news or money. The interchange may be between residents of different states or residents of the same state, but the property exchanged must move from one state to another. There can be no interstate commerce without interstate transportation of property, which includes money as well as merchandise and whatever can become the subject of exchange.

Even upon the assumption that certificates of stock are property, the transaction in question involved no movement of property from one state to another, for so far as appears neither money nor property was brought into the state or taken out of it. A citizen of Connecticut met another citizen of that state in the city of New York and there bought the certificates of him, which were delivered and paid for on the

spot. There is no statement in the record that the certificates were brought here to sell, or that the money used was brought here to purchase them. As we have seen, the certificates may have been here for years and this is true of the money also, for it belonged to a broker who carried on business at his office in the city of New York. There was an exchange of certificates for money made in this state, without the transportation of either from another state, as we must presume from the record. This was commerce but not interstate commerce, because no property moved from one state to another. It was not commerce among states, within the meaning of the Constitution, as we read it. The fact that both actors in the transaction were non-residents has no bearing on the question, for commerce among the states does not depend on the residence of the parties but on the interchange of property between different states. The exchange in question was made here, the property exchanged was situated here and, so far as we are advised, nothing was brought into or taken out of the state in order to make the exchange, or as the result of the exchange as made. The fact that the certificates were issued by foreign corporations, operating railroads in other states, did not involve the movement of property from one state to another, any more than if A grants to B lands in Kansas by a deed given in this state. The stockholder's interest in the foreign corporation could not be brought into the state of New York and the certificates, which represent that interest, are presumed to have had a taxable *situs* here.

The discussion of this point has proceeded thus far on the theory that the tax is in substance a tax on property, but, as we have held, it is in fact a tax only on the privilege of transfer. But it is insisted that a tax on the privilege of transferring certificates issued by foreign corporations, when the transfer though made here is between non-residents, tends to prevent freedom of commercial intercourse and, hence, is a restraint upon interstate commerce. The direct effect of a tax on the privilege of making a contract in this state, to be per-

formed in this state, does not infringe upon interstate commerce because it does not involve the movement of property between states. Should the indirect effect be regarded as a restraint upon interstate commerce? If so, where is the application of the principle to stop, for if pushed to its logical conclusion the states will be prevented from managing their own affairs. The commerce clause was not intended to hamper state legislation, even if the indirect result should remotely affect commerce "among the several states." It was not designed to hinder the preservation of order or the procurement of means to that end by the taxation of transfers made within the state, even if they are from one non-resident to another and indirectly touch property without the state. It is the regulation of commerce that is impliedly forbidden and the regulation of commerce does not include everything distantly connected therewith. Remote and indirect results do not interfere with interstate commerce. A homely illustration will show my meaning. Two boys trade knives, that is commerce in its simplest form. If they live on opposite sides of a state line and the bargain is made on one side but delivery on the other, it is interstate commerce. If one of them is flogged for it, that is not interference with interstate commerce, even if it discourages interstate traffic. This example is not used to belittle an important subject, but to illustrate the fact that the indirect effect of state action is not prohibited, unless it discriminates against persons or property from other states, or necessarily has the effect of touching interstate commerce in some substantial way. A tax on the transportation of persons or property between states, or on the business of carrying it on, is direct it its effect and is a tax on commerce, but in a recent case, which held that a cab service maintained by a railroad for the use of interstate passengers is not interstate commerce, it was said: "Many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transporta-

tion, why is not the porter who carries the traveler's trunks from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?" (*New York ex rel. P. R. R. Co.* v. *Knight*, 192 U. S. 21, affirming *People ex rel. Penn. R. R. Co.* v. *Knight*, 171 N. Y. 354.)

While interstate commerce, as such, cannot be taxed at all, the property employed therein may be taxed, even if it is used to facilitate interstate traffic, such as the rolling stock of a foreign railroad corporation running cars into one state from another. (*Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18.) In deciding this case the court said: "There is nothing in the Constitution or laws of the United States which prevents a state from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. (Citing *Delaware R. R. Tax*, 18 Wall. 206, 232; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co.* v. *Penn.*, 114 U. S. 196, 206, 211; *Western Union Telegraph Co.* v. *Attorney-General of Mass.*, 125 U. S. 530, 549; *Marye* v. *Baltimore & Ohio R. R. Co.*, 127 U. S. 117, 124; *Leloup* v. *Mobile*, 127 U. S. 640, 649.)" A railroad company engaged in interstate commerce and operating a railroad lying partly within and partly without a state "is liable to pay an excise tax according to the value of the business done in the state." (*Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217.)

A state cannot regulate interstate commerce, for Congress only has that power, but as it can tax property employed therein the same as all other property, it can tax the privilege of transferring such property, provided it treats non-residents the same as residents and subjects all transfers in the same class to the same tax. If there is no discrimination in favor of domestic commerce, there is no attack on interstate commerce, for the indirect effect of such a tax is no greater than one laid on property used therein. Taxation of a telegraph company, doing an interstate business, upon its prop-

erty within the state is valid, but a statute authorizing an injunction to restrain the company from transacting business until an overdue tax is paid, is invalid, because it interferes with an act of Congress relating to post roads. The tax did not interfere, as the result was indirect, but the injunction did, because it was direct in its effect. (*Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530.)

A tax on the right to engage in interstate commerce, as by a commercial traveler, was held void as an attempt to regulate a subject under Federal control, but that is quite different in principle from a tax on all transfers of a certain kind of property, which, like all other property, may at times enter into interstate transactions, but is not peculiar thereto. (*Robbins* v. *Shelby County*, 120 U. S. 489.) The tax before us is not on the transfer of stock in foreign corporations, but on the transfer of stock in all corporations. "A uniform tax imposed by a state on all sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of the state enacting the law or of some other state, is valid," because "there is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by the citizens of" the state in question. (*Woodruff* v. *Parham*, 8 Wall. 123, 140; *Brown* v. *Houston*, 114 U. S. 622; *Emert* v. *Missouri*, 156 U. S. 297; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500.)

So a tax on all meat-packing houses in a state, or on the agents thereof, is valid although some do an interstate as well as a domestic business. (*Armour Packing Co.* v. *Lacey*, 200 U. S. 232; *Kehrer* v. *Stewart*, 197 U. S. 60.) A tax on the gross commissions of brokers derived, wholly in one instance and partly in another, from sales made in behalf of many non-resident principals who shipped goods from without the state for sale, was held to affect interstate commerce only so "incidentally and remotely as not to amount to a regulation"

thereof. (*Ficklen* v. *Shelby County*, 145 U. S. 1.) Where the business of the brokers was not general, with the right to engage in all kinds, but was in terms limited to specific, non-resident principals, the effect was held to be direct and the tax void. (*Stockard* v. *Morgan*, 185 U. S. 27, 37.) The cases distinguish, carefully and critically, between direct and remote results and with reason, for the Constitution is not sensitive to clouds on the horizon but to clouds overhead. In the nature of things every slight and incidental consequence of state action does not constitute state regulation, for this would lead to sad confusion and leave the subject in perpetual doubt. Attention should be paid to the interests of the state as well as those of the nation and a construction just to both should be adopted. The legislative power of the state should not be shackled, and the commerce clause of the Constitution should not be frittered away by extreme views in either direction. Immaterial, indirect and remote effects should be ignored and substantial results alone considered. As Mr. Justice PECKHAM recently said: "The effect upon the commerce spoken of must be direct and proximate. (*N. Y., L. E. & W. R. R. Co.* v. *Penn.*, 158 U. S. 431, 439.) An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct." (*Hopkins* v. *United States*, 171 U. S. 578, 594, citing *Sherlock* v. *Alling*, 93 U. S. 99, 103; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *Pittsburg & Southern Coal Co.* v. *Louisiana*, 156 U. S. 590, 597; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Ficklen* v. *Shelby County*, 145 U. S. 1.)

The principles governing interstate commerce are in process of development, and, as is usually true in evolving the law out of many complicated cases, the treatment by the courts has not always been uniform or consistent. We think, however, that the weight of authority regards state legislation, which treats all persons, all property and all transfers of the same class in the same way under the same circumstances,

and which does not directly or materially touch interstate commerce, as not amounting to state regulation. While restraint by the state is regulation by the state, it must be direct or substantial to have that effect, and the statute under consideration falls under neither head. The question is not whether the statute is wise, but whether it is valid, and we think it is valid.

The order appealed from should be affirmed.

CULLEN, Ch. J., O'BRIEN, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Order affirmed.

MAX BACHMAN, Respondent, *v.* CHARLES H. HARRINGTON, as President of the ROCHESTER MUSICIANS' PROTECTIVE ASSOCIATION, Appellant.

1. INJUNCTION. A court of equity has no inherent absolute power to grant interlocutory injunctions — that authority must be found in the Code of Civil Procedure.

2. MANDATORY INJUNCTION — CODE CIV. PRO. §§ 603, 604. While under the Code of Civil Procedure it is within the power of a court of equity, in proper cases, to issue mandatory injunctions, such power is not unlimited, and when the exercise of such power exceeds the limit, it is not a mere error, but void as without jurisdiction.

3. SAME. Where the complaint presents a case showing or tending to show that affirmative action by the defendant of a temporary character is necessary to preserve the status of the parties, then a mandatory injunction may be granted; but if there be neither proof nor allegation to that effect, and the act sought to be enforced is not continuous in its character, but solely the one sought to be decreed by final judgment, then the issuing of a preliminary mandatory injunction is without authority.

4. VIOLATION OF VOID ORDER NOT PUNISHABLE AS FOR A CIVIL CONTEMPT. Where the main object of an action by a suspended member of a voluntary association is to compel his reinstatement as a member in good standing, the court has no power to grant an interlocutory injunction requiring his reinstatement; and in a proceeding to punish as for a civil contempt the violation of such injunction, the lack of authority to grant it is a complete defense.

Bachman v. *Harrington*, 108 App. Div. 357, reversed.

(Submitted March 2, 1906; decided April 17, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 11, 1905, which affirmed an order of Special Term adjudging the defendant guilty of contempt of court and punishing him therefor.

The questions certified and the facts, so far as material, are stated in the opinion.

George D. Forsyth for appellant. The order directing the reinstatement of plaintiff into membership in the defendant's association was void, and the first question submitted should be answered in the affirmative. (*People ex rel. Johnson* v. *N. Y. P. Exchange*, 149 N. Y. 401; *Lewis* v. *Wilson*, 121 N. Y. 284; *Bachman* v. *Arbeter*, 64 How. Pr. 442; *Fargo* v. *N. Y. & N. E. R. R. Co.*, 52 N. Y. S. R. 205; *Stewart* v. *Palmer*, 74 N. Y. 191; *Dartmouth College Case*, 4 Wheat. 519; *R. L. Co.* v. *Erie Ry. Co.*, 20 N. J. Eq. 379; *Spears* v. *Matthews*, 66 N. Y. 127; *Scott* v. *McNeal*, 154 U. S. 34; *Jackson* v. *Bunnell*, 113 N. Y. 216.)

Hugh J. O'Brien for respondent. The first question certified should be answered in the negative. (*People* v. *Sturtevant*, 9 N. Y. 263; *E. Ry. Co.* v. *Ramsey*, 45 N. Y. 637; *People* v. *Bergen*, 53 N. Y. 404; *Daly* v. *Amberg*, 126 N. Y. 490; *Matter of Leggat*, 47 App. Div. 381; *Stolts* v. *Tuska*, 82 App. Div. 81; *People* v. *Marr*, 83 App. Div. 422; *People ex rel. Cauffman* v. *Van Buren*, 136 N. Y. 252; *Ketchum* v. *Edwards*, 153 N. Y. 534; *Sheffield* v. *Cooper*, 21 App. Div. 518.)

CULLEN, Ch. J. The plaintiff, a member of the Rochester Musicians' Protective Association, an unincorporated association, was suspended from his membership. Thereupon he brought this action against the defendant, as president of the association, alleging the illegality of the action of the association which resulted in his suspension and prayed judgment for a mandatory injunction ordering that he be reinstated as a

member in good standing and restraining the defendant from taking further steps towards the prosecution of the plaintiff and from suspending or expelling him, and from denying to him any of the benefits of membership in the association and preventing or attempting to prevent members of the association by threats, persuasion, speech, writing or otherwise, from working with or for the plaintiff, and also for damages on account of his suspension. On this verified complaint an injunction was granted; the injunction order, the disobedience of which is the subject of this proceeding, was granted by a judge of the court *ex parte*, but with an order to show cause why it should not be continued. The material part of the order is the following: "That he, they (agents, servants, etc.) and each and every one of them do absolutely desist and refrain from denying to the plaintiff any of the benefits of membership in said Rochester Musicians' Protective Association, from suspending or expelling the plaintiff, from taking further steps towards the prosecution of the plaintiff for the alleged violation of Article 13, Section 14, of the By-laws of said Association, from preventing or attempting to prevent members of said Association by threat, persuasion, speech, writing or otherwise from working with or for the plaintiff in his profession, from preventing or attempting to prevent the plaintiff obtaining work in his profession, from threatening other members of said Association with expulsion, suspension or fines if they work for or with the plaintiff; and on motion of O'Brien & O'Brien, plaintiff's attorneys, the defendant as President of said Rochester Musicians' Protective Association, it is further

"*Ordered*, under the penalties by law prescribed, that he immediately reinstate said plaintiff as a member in good standing of said Rochester Musicians' Protective Association; and that the defendant as such President take no steps whatever to deny to said plaintiff all and every privilege of membership in said Association pending the further order of this court in the premises; and let the defendant show cause at a Special Term of this court, to be held at the Court House, in the City

of Rochester, on the 6th day of May, 1905, why the injunction order herein granted should not be continued pending the determination of this action. Dated May 3, 1905."

Thereafter the plaintiff instituted these proceedings to punish the defendant for contempt on affidavits tending to show that the defendant had violated the injunction order in many respects. Counter affidavits were submitted by the defendant. The learned Special Term acquitted the defendant of the charge of disobedience in every respect but one. As to the exception, it found that the "defendant wholly failed, neglected and refused to reinstate the plaintiff as a member in good standing of said defendant association in violation of said order." It also found that such disobedience prejudiced the rights of the plaintiff and imposed a fine upon the defendant of the sum of $160, to be paid to the plaintiff as indemnity. This order was affirmed by the Appellate Division, which has allowed an appeal to this court and certified two questions: "*First.* Was that portion of the original injunction order granted by a Justice of the Supreme Court on the third day of May, 1905, which required the defendant association immediately to reinstate the plaintiff as a member in good standing, void? *Second.* Can the defendant, an unincorporated association, be convicted of a contempt of court upon the facts appearing in the record herein?"

It is to be first observed that the proceeding before us is to punish the defendant, not for a criminal contempt, but for a civil contempt. In the first class of contempts punishment is imposed for the outrage on the majesty of the law and the authority of the court, and any fine goes to the people. In the second case the proceeding is instituted for the violation of the private right, and a fine is imposed to be paid to the plaintiff as indemnity for the violation of that right. (*People ex rel. Munsell* v. *Court of Oyer and Terminer*, 101 N. Y. 245.) Therefore, accepting to its fullest extent the doctrine declared in *People ex rel. Gaynor* v. *McKane* (78 Hun, 154), of the power of the court to punish as for a criminal contempt the violation of an injunction order, even though the complaint

fails to state a good cause of action, that doctrine has no application to the present case. Of course, the question before us is as to the power of the court, not as to the propriety of its action. If, on the papers presented, the court had authority to make the order that the defendant forthwith reinstate the plaintiff as a member of the association, though it erred in making the order, the defendant was properly convicted. But if the court had no authority to make that order, then the defendant should not be punished. It is well settled by repeated decisions of this court that in this state a court of equity has no inherent absolute power to grant interlocutory injunctions, but that authority therefor must be found in the Code of Civil Procedure. (*Fellows* v. *Heermans*, 13 Abb. Pr. [N. S.] 9; *Spears* v. *Mathews*, 66 N. Y. 128; *Erie Ry. Co.* v. *Ramsey*, 45 N. Y. 637; *People ex rel. Morris* v. *Randall*, 73 N. Y. 416; *Gardner* v. *Gardner*, 87 N. Y. 18; *Jackson* v. *Bunnell*, 113 N. Y. 216; *People ex rel. Cauffman* v. *Van Buren*, 136 N. Y. 252.) The subject is regulated by sections 603 and 604 of the Code of Civil Procedure, which provide: "§ 603. Injunction, when the right thereto depends upon the nature of the action. Where it appears, from the complaint, that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case, provided for in this section, is described in this act as a case where the right to an injunction depends upon the nature of the action. § 604. When the right thereto depends upon extrinsic facts. (Amended by ch. 416 of 1877.) In either of the following cases an injunction order may also be granted in an action: 1. Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done, or threatens, or is about to do, or to procure, or suffer to be done, an act, in violation of the plaintiff's rights, respecting the subject of the action, and tending to

render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

"2. Where it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition." In the present case the defendant being a voluntary association, the action for reinstatement was properly brought in equity, though as to a corporation the remedy would be by mandamus. But reinstatement in the association was the final relief sought. So far as the complaint sought to restrain the enforcement of his suspension against the plaintiff, the case falls within section 603, and the court had power to restrain by temporary injunction the same acts which, were the plaintiff successful, would be restrained by a final judgment, but that in no way includes reinstatement, which so far from being restrained would be enforced by the final judgment. No authority for the order of reinstatement is to be found in the first subdivision of section 604, because that is confined to the commission of acts which tend to render the judgment ineffectual. The second subdivision is not relevant to the subject before us. While, however, the language of the Code in terms authorizes an injunction only against the commission of acts, still it is doubtless within the power of a court of equity in proper cases to issue mandatory injunctions, and the provisions of the Code should not be so strictly construed as to deny that power in any case. But while such power may exist it is by no means unlimited, and when it exceeds the limit it is not a mere error, but void as without jurisdiction. It has been well said by Judge COOLEY: "The court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it." (*Arnold* v. *Bright*, 41 Mich. 207.) So in an action for the specific performance of a contract for the sale of real estate the court doubtless may restrain the defendant pending

the action from conveying, incumbering or in any way disposing of the subject of the suit, but an *ex parte* order that the defendant forthwith convey the premises to the plaintiff, even though phrased in the form of an injunction restraining him from refusing to forthwith make the conveyance, in my opinion would be not merely erroneous, but absolutely void. On the other hand, in the case of a threatened violation of a contract continuous in its character, such as a contract to furnish water or light during a term, the defendant might be restrained from failing to supply water or light during the pendency of the litigation. The essential difference between the two classes of cases and the nature and function of an interlocutory injunction are well stated by Judge TAFT of the United States Circuit Court in *Toledo, etc., R. Co.* v. *Pennsylvania Company* (54 Fed. Rep. 730): "The office of a preliminary injunction is to preserve the *status quo* until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the *status quo* is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits." To that doctrine I express my full assent. Therefore, where the complainant presents a case showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties, then a mandatory injunction may be granted. But if there be neither proof nor allegation to that effect and the act sought to be enforced is not continuous in its character, but solely the one sought to be decreed by final judgment, then the issuing of a preliminary mandatory injunction is without authority. In the present case the strictly injunctive provisions of the order alleged to be violated were of the broadest and most sweeping character. The defendant was enjoined from denying "to the plain-

tiff any of the benefits of membership in said association * * * from preventing or attempting to prevent members of the association by threat, persuasion, speech, writing or otherwise from working with or for the plaintiff in his profession, from preventing or attempting to prevent the plaintiff from obtaining work in his profession." The injunction to this extent was within the power of the judge to grant, and it operated during its continuance to nullify the suspension of the plaintiff. The defendant, however, has been acquitted of any violation of these provisions of the order, and he has been punished solely for failure "to reinstate the plaintiff as a member in good standing." What the defendant was to do to effect such a result is not stated in the order. On the motion to punish for contempt, the plaintiff produced the by-laws of the association, in which is found the following provision: "Section 1. Any member having resigned, or been erased, or expelled, from this association, can again become an active member only by reinstatement at a regular meeting or a special meeting called for the purpose, and by having a vote of two-thirds of the members present. * * * Any member who may have resigned and wishes to be reinstated can make application to the secretary in writing." It is for failure to take action under these provisions that the defendant has been punished. As already said, this was the very relief that the plaintiff sought to obtain by a final judgment. Had the defendant complied with the order of the judge, the plaintiff might have discontinued the action, or let it go against him by default, for he would have obtained all he sought except damages. True, the plaintiff might have been subsequently tried and expelled from the association, but in that respect his case would in nowise differ from that of any other member of the association. Being a member in good standing, charges again would have to be preferred against him and he would be again entitled to a trial. Counsel for the appellant urges that the order directed only a temporary reinstatement pending trial or hearing. It is a sufficient answer to this to say that such

are not the terms of the order. It directs reinstatement unqualified. Nor is there any provision in the by-laws for a reinstatement of a temporary character, or any procedure with reference to it prescribed. So far as what is termed a temporary reinstatement is involved, that was effected by the order of the court which enjoined the defendant from denying the plaintiff any of the benefits of membership. As long as the defendant complied with this provision the plaintiff was substantially reinstated.

It is suggested by counsel, based on a statement in the affidavit of the defendant in answer to the proceedings to punish him for contempt, that members of the union would not work with the plaintiff unless he was actually reinstated, even though the association should recognize his rights and obey the injunction of the court. There is no suggestion, however, of this character to be found in the complaint on which exclusively the injunction was granted. If there had been presented any proof, or even if there were an allegation in the complaint that a mere restraining order, however fully obeyed, would be practically inoperative to maintain the status of the plaintiff unless accompanied by a temporary reinstatement in the association and the court or judge had ordered a temporary reinstatement pending the hearing or trial, a different question would be presented. There is no such question, however, in the present case. Indeed, if the defendant or the association which he represented had assumed to make some qualified or limited reinstatement of the plaintiff his liability to punishment for contempt would have been the same as at present for he would have failed to comply with the mandate of the court. True, had he done so the court might have looked on his offense more leniently. That, however, would have been merely a matter of favor. There is presented to us in this case not the question of favor but of legal right.

If the court had no authority to grant the order which the defendant is charged with violating, that he cannot be punished as for a civil contempt is settled by authority, what-

ever may be the rule in the case of a criminal contempt. (*People ex rel. Morris* v. *Randall*, *supra*; *Gardner* v. *Gardner*, *supra*; *People ex rel. Cauffman* v. *Van Buren*, *supra*.) In *Matter of Sawyer* (124 U. S. 200) the Supreme Court of the United States held that an injunction granted by the Circuit Court of the United States to restrain the city authorities from removing a police judge was absolutely void, because a court of equity had no authority to restrain the removal of a public officer, and discharged the defendants on habeas corpus. The foregoing views render it unnecessary to consider the second question certified to this court.

The orders of the Appellate Division and of the Special Term should be reversed and the motion to punish for contempt denied, with costs in this court and ten dollars costs of motion. The first question certified should be answered in the affirmative. The second need not be answered.

O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur; HISCOCK, J., not sitting.

Orders reversed, etc.

ANNE McCORMACK, Respondent, *v.* CHARLES E. CODDINGTON et al., Respondents, and THE PEOPLE OF THE STATE OF NEW YORK, Appellant.

1. ESCHEAT — FAILURE TO FILE DECLARATION OF CITIZENSHIP BY ALIEN HEIR. Under section 4 of chapter 115 of the Laws of 1845 (amd. L. 1874, ch. 261; L. 1875, ch. 38) an alien inheriting real estate from a citizen could hold it as against the state only by making and filing a deposition or affirmation of his intention to become a citizen, as required by the first section of the act. A failure to file such declaration rendered his title liable to forfeiture during life by the state in proceedings to be taken for that purpose; upon his death without having filed such declaration, the fact that the state failed in his lifetime to take such proceedings did not constitute a waiver or loss of its rights and permit him to transmit his title by inheritance to a citizen heir; but his death *ipso facto* worked an immediate escheat to the state, no proceedings on its part having been necessary to effect it, and, therefore, in the absence of any legislation authorizing it, the title of such heir cannot be successfully maintained

as against the state, in a subsequent partition action in which it asserts its rights.

2. Insufficiency of Statutes Relied upon as Waiving Right of Escheat — L. 1877, Ch. 111; L. 1893, Ch. 207; 1 R. S. 754, § 22. Subsequent legislation claimed to have waived such defect in title or to have perfected title in such heir, cannot be so regarded: 1. Chapter 111 of the Laws of 1877 assumes to relieve from question or impeachment a right, title or interest which has been "acquired" by a citizen — the title in this case having reverted to the state, nothing was acquired by the heir. 2. Chapter 207 of the Laws of 1893, passed after the death of such alien, while broad enough in its language to justify the contention, relates to cases arising after its passage, and not to that of an alien dying before it took effect; if given a retroactive effect it would be unconstitutional, not purporting to have been passed by the two-thirds vote necessary to divest the state of its title. (Const. art. 3, § 20.) 3. The Revised Statutes (1 R. S. 754, § 22), providing that no person capable of inheriting shall be precluded therefrom by reason of the alienism of any ancestor, would cure the trouble arising from the alienism of an intermediate link in the chain of pedigree if the alien in question had been otherwise capable of transmitting title.

3. Statutes of Descent Require Ancestor to Be Possessed of Some Inheritable Title. The fact that the Statutes of Descent expressly qualified and entitled the heir to inherit from such alien is immaterial for the reason that there was no interest to inherit. Those statutes require not only a person capable of inheriting, but also an ancestor possessed of some title which is the subject of transmission at the time of his death.

McCormack v. *Coddington*, 109 App. Div. 741, reversed.

(Argued March 1, 1906; decided April 17, 1906.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 29, 1905, which modified and affirmed as modified an interlocutory judgment of Special Term directing a partition and sale of real property.

The following questions were certified: "*First.* Margaret Clifford, a naturalized citizen or a resident alien, on April 12th, 1873, acquired the real property in suit by purchase. She died on June 21st, 1882, and upon her death one-fifth of the said real property, under Laws of 1845, Chapter 115, as amended by Laws of 1875, Chapter 38, devolved by descent upon her brother, Patrick Casey, a non-resident alien, of full

age, subject to the life estate of Mary Casey, the mother of said Margaret Clifford. The said Patrick Casey, on May 30th, 1883, died intestate, a non-resident alien, prior to the termination of the life estate of his mother, Mary Casey, and without having made or filed in the office of the Secretary of State the deposition or affirmation referred to in the first section of the Laws of 1845, Chapter 115, leaving as his heir at law Maria Rooney, a citizen of the United States. Did the estate or interest of said Patrick Casey in one-fifth of said real property pass by descent to Maria Rooney, a sister, his only heir at law, who was a citizen of the United States?

"*Second.* If the first question be answered in the negative then did the said undivided one-fifth interest in said land of which the said Patrick Casey was seized, instantly upon his death, escheat to the state without a judgment of forfeiture or other legal proceeding?"

The facts, so far as material, are stated in the opinion.

Edward M. Bassett and *W. W. Thompson* for appellant. By the common-law rule in this state no alien could even take land by inheritance, although he could take and hold it (against all save the state) by purchase, nor could he transmit land by descent to either his citizen or alien natural heirs. (Const. of 1846, art. 1, § 11; *Goodrich* v. *Russell*, 42 N. Y. 177; *Larreau* v. *Davignon*, 5 Abb. Pr. [N. S.] 370; *Jackson* v. *Adams*, 7 Wend. 367; *Mooers* v. *White*, 6 Johns. Ch. 360; *People* v. *Irwin*, 21 Wend. 128; 2 Am. & Eng. Ency. of Law [2d ed.], 70.) Section 4 of chapter 115, Laws of 1845, as amended by chapter 38, Laws of 1875, did not remove the common-law prohibition denying an adult alien male the right to transmit land by descent to either his citizen or alien heirs unless such alien first filed the required statutory affirmation of intended citizenship. (*Dean* v. *M. E. R. Co.*, 119 N. Y. 540; 26 Am. & Eng. Ency. of Law [2d ed.], 662; 1 R. S. 719, 720, §§ 1, 18; *Renner* v. *Muller*, 12 J. & S. 544; *Stewart* v. *Russell*, 91 App. Div. 310; *Callahan* v. *O'Brien*, 72 Hun, 216.) Although the statute

in question gave to Patrick Casey inheritable blood for the purpose of taking and holding by inheritance an interest in the premises in question, it did not give him inheritable blood, of which he was deprived by the common law, for the purpose of transmitting the same by descent unless he filed the statutory affirmation. (1 R. S. 719, 720, §§ 1, 18; *Croner* v. *Cowdrey*, 139 N. Y. 471.) The title to Patrick Casey's vested remainder in an undivided one-fifth of the premises passed at his death to the state by escheat, but possession thereof was deferred until the death of Mary Casey, the life tenant, on June 23, 1899. Since then the state has been and now is in possession of the premises with the other tenants in common. (*Thompson* v. *Simpson*, 128 N. Y. 270; *Barber* v. *Brundage*, 169 N. Y. 368; *Culver* v. *Rhodes*, 87 N. Y. 348; *Luhrs* v. *Eimer*, 80 N. Y. 171; *Wainright* v. *Low*, 132 N. Y. 313; *Blight* v. *Rochester*, 7 Wheat. 535; *State* v. *Olin*, 23 Wis. 309; *Hauenstein* v. *Lynham*, 100 U. S. 483.) Chapter 207 of the Laws of 1893 does not by its terms have a retrospective effect. And on well-settled principles of statutory construction said statute can only refer to a descent cast subsequent to its passage. (*N. Y. & O. M. R. R. Co.* v. *Van Horn*, 57 N. Y. 473; *G. S. Bank* v. *Suspension Bridge*, 159 N. Y. 369; *Stewart* v. *Russell*, 91 App. Div. 310; *Jackson* v. *Fitzsimmons*, 10 Wend. 13; *Wainwright* v. *Low*, 132 N. Y. 317; *Luhrs* v. *Eimer*, 80 N. Y. 171; *People ex rel. Purdy* v. *Comrs. of Highways*, 54 N. Y. 276; *Supervisors* v. *Brogden*, 112 U. S. 268; *Matter of N. Y. & L. I. B. Co.*, 148 N. Y. 551.)

John C. Thomson for respondents. Under the statutes of this state, Maria Rooney, a citizen of the United States, inherited on the death of Patrick Casey the one-fifth interest in the premises in suit which, under the Laws of 1845, chapter 115, section 4, as amended by Laws of 1875, chapter 38, devolved upon him on the death of Margaret Clifford. (*Callahan* v. *O'Brien*, 72 Hun, 216; *Stewart* v. *Russell*, 91 App. Div. 310; *Luhrs* v. *Eimer*, 80 N. Y. 171; *Leary* v.

Leary, 50 How. Pr. 122; *Parish* v. *Ward*, 28 Barb. 328; *Jackson* v. *Jackson*, 7 Johns. 214; *Orser* v. *Hoag*, 3 Hill, 79; *Maynard* v. *Maynard*, 36 Hun, 227; *Hall* v. *Hall*, 81 N. Y. 130; *Stamm* v. *Bostwick*, 122 N. Y. 48; *Croner* v. *Cowdrey*, 139 N. Y. 471.) The provisions of the Laws of 1877, chapter 111, operate as a waiver by the state of any rights founded on the lack of capacity of an alien to transmit title to an heir who is a citizen of this state. (*Kohl* v. *U. S.*, 91 U. S. 367; *Matter of Gill*, 79 Iowa, 296; *Leflore Co.* v. *Allen*, 80 Miss. 298; *Luhrs* v. *Eimer*, 80 N. Y. 177; *Hall* v. *Hall*, 81 N. Y. 130; *Wainwright* v. *Low*, 132 N. Y. 313; *McGillis* v. *McGillis*, 154 N. Y. 532.) Under the provisions of the Revised Statutes, Maria Rooney was not precluded from inheriting by reason of the alienage of Patrick Casey. (*McCarthy* v. *Marsh*, 5 N. Y. 263; *Wheeler* v. *Clutterbuck*, 52 N. Y. 67.) Chapter 115 of the Laws of 1845, section 4, as amended by Laws of 1875, chapter 38, under the settled policy of construction of grants or conveyances, operated to vest in Patrick Casey an estate of inheritance, with capacity to transmit to such heirs as have capacity to inherit. (1 R. S. 722, §§ 1, 2.)

Hiscock, J. This is an action of partition, and the question arising between the People and the respondents here presented is whether a certain interest in real estate which had been taken by an alien heir, upon his death passed by descent to his sister, being a citizen of the state, as his heir, and thence by conveyance from her and others to the Coddingtons, or whether such interest escheated to the state. The trial court adopted the latter view; the Appellate Division by a divided vote the former one. We agree with the trial court, and think the judgment appealed from should be reversed in so far as it modifies that of the trial court.

The facts which raise this issue are as follows:

In April, 1873, Margaret Clifford, being a citizen or resident alien (and it is immaterial for the purposes of this inquiry which), purchased the entire premises involved in

this action, and died seized thereof June 21, 1882. It is conceded that by chapter 115 of the Laws of 1845, as amended, and to which more extended reference will be made hereafter, some right, title or interest to one-fifth of this property upon her death subject to a life estate of her mother descended to her brother, Patrick Casey, who was at all times a non-resident alien and who, although of full age, never filed any declaration of an intention to become a citizen, as required by the statute. The mother died June 2, 1899, and the brother died intestate May 30, 1883, without ever having attempted to make any conveyance of his interest, which is the one here involved. Of the brother and three sisters whom he left him surviving, only one, Maria Rooney, was a citizen of the state of New York. She claimed to inherit his interest and to make conveyance thereof to the defendants Coddington or intermediate grantors.

The quality and nature of the estate which Patrick Casey inherited from his sister and the decision of the question whether he did transmit an estate by inheritance to his citizen sister, is dependent, as I think, entirely upon section 4 of chapter 115 of the Laws of 1845, as amended by chapter 261, Laws of 1874, and chapter 38, Laws of 1875, and which reads as follows:

"Section 4. If any alien resident of this State, or any naturalized or native citizen of the United States, who has purchased and taken, or hereafter shall purchase and take, a conveyance of real estate within this State has died, or shall hereafter die, leaving persons who, according to the statutes of this State, would answer the description of heirs of such deceased person, * * * and being of his blood, such persons so answering the description of heirs, * * * whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs, * * * as if they were citizens of the United States the lands and real estate owned and held by such deceased alien or citizen at the time of his decease. But if any of the persons so answering the description of heirs, * * * as

aforesaid, of such deceased person, are males of full age, they shall not hold the real estate hereby made descendible or devisable to them as against the state unless they are citizens of the United States, or in case they are aliens, unless they make and file in the office of the Secretary of State the deposition or affirmation mentioned in the first section of this act."

It is claimed by respondents that other statutes subsequently passed cured the defects, if any, under the one just referred to, and made a perfect and secure chain of title to them. I do not agree with this contention, which will be considered more at length hereafter.

There is no question that Casey took a title which was complete and perfect as against everybody but the state. That, however, is now present asserting its rights.

Respondents at times seem to make an argument in reference to the broad, general character of his title as including the right of transmission by inheritance, which can only be predicated upon the first part of the statute construed by itself. But, of course, we must interpret the enactment as a whole, and especially must determine what is the effect upon the first general provision that he might take and hold the title, of the later provision that he could not hold unless he did certain things.

There is no question that the state by proper proceedings during his lifetime might have procured a forfeiture of Casey's title by reason of his default, if persisted in. But respondents' counsel argues that such proceedings were essential to effect an escheat, and that failing in them the state forever lost its rights and the title passed by death to the heir. And it does seem that if his heir took a title which was merely defeasible and subject to escheat in proceedings thereafter to be instituted for that purpose, this defect would be cured and the title made perfect in this respect by the provisions of chapter 111, Laws of 1877, hereafter quoted and referred to.

I shall, therefore, assume that the precise, narrow query is whether Casey's failure to file his declaration upon his death

ipso facto worked an immediate escheat to the state, or whether the omission of the state to take advantage of this failure by proceedings during his life worked a waiver or loss of its rights and permitted him to transmit his title by inheritance. The possibility of compliance with the statute which required Casey to do something as a condition of holding the real estate ceased with his death. The state had omitted to take advantage of his default by proper proceedings during his life. Where did these several omissions leave the rights of the parties?

I am not able to reach the conclusion that Casey's death was an excuse for non-compliance or a substitute for compliance with the statute, or that he could transmit by inheritance to another that which under the circumstances he was forbidden to hold himself, or that upon the undisputed facts of his default it was necessary to institute proceedings to effect an escheat to the state of a title which could not go elsewhere without violating the requirements of the statute.

At common law Casey had no right to take or hold the title. The statute, construed as an entirety, said he might take it from the ancestor, but that he could not hold it unless he filed his declaration. The effect of this was to modify the common law which forbade his holding, only in case he complied with certain conditions. If he did not comply with those conditions he did not escape from the rule of the common law. The exaction was a proper one. The state was conferring new privileges upon aliens, and it had a perfect and equitable right to demand as the price thereof that they should assume certain duties and responsibilities for its benefit. (*Marx* v. *McGlynn*, 88 N. Y. 357, 376.)

And it is very insistent in demanding this assumption upon their part. Again and again in the different sections of the act under review, we find the grant of new rights to aliens followed by the insertion of this corresponding requirement for a declaration by them.

Casey died without fulfilling the condition imposed upon him. He had failed to do the thing that was necessary to

abrogate the rule of the common law and allow him to hold the title. At the moment of death he had no right to hold the title and had no right to pass it on to another. The title could not remain floating around in abeyance. Under the statute it should not be allowed to pass to the heir and, therefore, of necessity it reverted at once and without proceedings to the state.

This view seems to be sustained by those decisions which deal with the question of escheats under the common law Under the latter an alien might acquire land by purchase and obtain a title good as against all but the state. During the life of the alien purchaser, the People could not enter without judicial proceedings. His entry and possession and holding were lawful and could be terminated only by regular legal proceedings for the purpose of ascertaining whether he was an alien or not. But when he died the title instantly and of necessity without any inquest of facts escheated and vested in the state because the freehold could not be kept in abeyance and because he was incompetent to transmit by hereditary descent. In other words, the necessity which existed during the life for legal proceedings by which to judicially determine the alienage of the holder and the right of escheat by the state ceased upon death and the title reverted upon the facts as they actually existed without any judicial determination of them. (*Goodrich* v. *Russell*, 42 N. Y. 177, 181; *Jackson* v. *Adams*, 7 Wend. 368; *Ettenheimer* v. *Heffernan*, 66 Barb. 374; *Mooers* v. *White*, 6 Johns. Ch. 360; *Hall* v. *Hall*, 81 N. Y. 130; *Larreau* v. *Davignon*, 5 Abb. Pr. [N. S.] 367.)

It is urged that the rule which applied in the case of real estate held by an alien under the common law should not be applied to the present case; that the policy of the law as evidenced by various statutes has become much more liberal towards aliens holding real estate. The answer to this is that the law has become more liberal in so far as the statutes have made it so, but I know of no principle or decision which authorizes us to hold differently than above indicated unless some statute permits it, and I find none such.

It is, however, contended that various statutes have been adopted which waived the right of escheat in the case before us, or operated to perfect title in the citizen sister of Patrick Casey.

The first one of these called to our attention is chapter 111 of the Laws of 1877, already mentioned, which provides that "The right, title or interest of any citizen or citizens of this state in or to any lands within this state now held or hereafter acquired shall not be questioned or impeached by the reason of the alienage of any person or persons from or through whom such title may have been derived," &c.

This statute does not seem to cover this case or perfect in the respondents a title to the land in question. It assumes to relieve from question and impeachment a right, title or interest which has been "acquired." This might apply to a case where an alien had made an attempted conveyance of lands, but if the reasoning is correct that coincidentally with the death of Patrick Casey all right, title and interest by escheat reverted to the state and did not pass to his heirs, then nothing was "acquired" by the latter upon which this statute might operate. The language is not appropriate to perfect or relieve from defect a title which might have been acquired except for its passing elsewhere.

It is also claimed that chapter 207 of the Laws of 1893, although adopted long after Patrick Casey's death, operated as a waiver by the state of any right or claim to the premises in question by escheat and thus perfected the title in the respondents. Said statute provides that "any person who would otherwise answer to the description of heir or devisee of a person, who, at the time of his death, was a citizen of the United States, shall be entitled to inherit or take from said citizen, and hold, enjoy, convey, transmit and devise any interest in real property situated in this state, in the same manner and to the same extent and with the same effect as if he was himself a citizen of the United States, notwithstanding the fact that he be a non-resident alien; and the fact that any person otherwise qualified to take, hold, enjoy, convey,

transmit and devise any interest in real property situated in this state, is a non-resident alien, shall not prevent his taking, holding, enjoying, conveying, transmitting and devising such interest, providing his title, or that of some person under whom he claims, shall be derived, by descent or devise, from some person who was, at the time of his death, a citizen of the United States."

There is no doubt that the language here employed is broad enough to encompass the purpose claimed by respondents if it is effectively retroactive. I do not think, however, that it is so. A construction of the language used, in its ordinary and natural meaning, makes it relate to cases arising after and not before the passage of the statute. If it is retrospective and relates back to 1883 when Patrick Casey died, then, of course, it also reaches to the very creation of the state. We are not readily to assume that it was the intention of the legislature to pass an act which would thus affect titles to property throughout the state.

The fact that at the same session of the legislature at which this act was adopted and after its passage at least four other acts were passed releasing the rights of the state in escheated lands and which would have been unnecessary if the act under consideration was subject to the construction claimed by respondents, is a very practical argument that the legislature did not intend any such consequences.

The learned Appellate Division seems to have adopted the view that it was retroactive, but the same court, with the concurrence of the learned justice now writing the prevailing opinion, in *Stewart* v. *Russell* (91 App. Div. 313) held that it had no retroactive effect and might not be invoked in determining the status of a party claiming to inherit real property from an ancestor dying before the passage of the act.

Further than this, if, as claimed by respondents, said act in its terms was retroactive and did apply to the case before us, it would be unconstitutional, and, therefore, ineffectual to accomplish the result claimed for it.

Upon respondents' theory upon this point, the state, having

acquired by forfeiture the title to real estate prior to 1893, passed this statute whereby, in effect, it divested itself of such title and granted and conveyed it without consideration to an individual. I see no room for doubt that such an act comes within the provisions of the Constitution (Art. 3, sec. 20), in force at the time when said act was passed, providing that "the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." It does not need amplification of argument to demonstrate that the property which had been acquired by the state was public property and that the purpose claimed for the act, in this instance, was of a private and individual character.

The bill does not purport to have been passed by the requisite constitutional vote, and, therefore, if otherwise complying with respondents' contention, would be invalid on this account.

While such authority seems unnecessary, it is of interest as indicating the practical interpretation placed by the legislature upon the constitutional necessity for the assent of two-thirds of its members in each branch to a bill releasing escheated lands acquired by the state to an individual, that an examination of a large number of bills passed to cover individual cases discloses that, with a single exception, all were adopted by such a vote, and chapter 261 of the Laws of 1874, chapter 38 of the Laws of 1875, and chapter 111 of the Laws of 1877, which have been especially referred to upon this subject as retroactive in terms or effect, were each adopted by such a vote.

Lastly, it is urged that the Statutes of Descent expressly qualified and entitled the citizen sister to inherit these lands from her alien brother. The trouble with this claim is the same as that before suggested in connection with another one. The Statutes of Descent undoubtedly did designate and qualify the sister as the person to inherit Patrick Casey's interest, but provided always that there was some interest to inherit. If

the reasoning has been correct that he lost the right to hold the title which he had taken provisionally and that the same at the instant of his death was forfeited and escheated to the state, then, of course, there was nothing which could pass to or be inherited by his sister under the statutes referred to. They require not only a person capable of inheriting but also an ancestor possessed of some title which is the subject of transmission at the moment of his death. This latter requirement was lacking.

Nor do I think that respondents are aided by the provision of the statute that "No person capable of inheriting under the provisions of this chapter shall be precluded from such inheritance by reason of the alienism of any ancestor of such person." That statute would cure the trouble arising from the alienism of an intermediate link in the chain of pedigree, if Patrick Casey had been otherwise capable of transmitting title. (*McLean* v. *Swanton*, 13 N. Y. 535.)

In accordance with these views the first question certified to us should be answered in the negative and the second one in the affirmative, and the order of the Appellate Division, in so far as it modified the interlocutory judgment entered at Special Term, should be reversed and said judgment of the Special Term be affirmed, with costs to the appellant in all the courts.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur.

Judgment accordingly.

ALBERT T. WESTON, Respondent, *v.* COMMERCIAL ADVERTISER ASSOCIATION, Appellant.

LIBEL — DEFAMATORY STATEMENTS AS TO CERTAIN CLASS OF PUBLIC OFFICIALS — ACTION BY ONE OF SUCH PERSONS TO RECOVER DAMAGES — DEMURRER. Where an article, published in a newspaper at the time of the criminal conviction of a coroner of the city of New York, detailed with great particularity the manner in which unlawful and iniquitous practices were employed in the office of coroner to secure illegal gains, more than once specifically mentioned the coroners' physicians as employ-

ing these means, stated that the criminal practices pervaded "the entire office," but that "most of the graft goes, not to the underlings, but to those higher up," it cannot be said as matter of law that such language was employed in criticism of some body or class or in relation to general conditions, and that it had no personal and individual application or significance; and a demurrer to the complaint in an action of libel, by a coroner's physician in office at the time of the publication of such article, alleging that it was published of and concerning the plaintiff as such physician, and demanding damages therefor upon the ground of failure to state a cause of action, is properly overruled.

Weston v. *Commercial Advertiser Assn.*, 110 App. Div. 888, affirmed.

(Argued March 2, 1906; decided April 17, 1906.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 30, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint.

The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

The nature of the action and the facts, so far as material, are stated in the opinion.

Howard Taylor for appellant. When defamatory language is written or spoken of a certain set of men the same does not support an action for libel or slander by either one or all of the class. (*Sumner* v. *Buel*, 12 Johns. 475; *Ryckman* v. *Delavan*, 25 Wend. 186; *Ellis* v. *Kimball*, 16 Pick. 132; *Eastwood* v. *Holmes*, 1 Fost. & Fin. 347; Newell on Slander & Libel, 258.) The article in the case at bar, describing a course of conduct habitual throughout a public office or bureau, falls within the category of defamatory language addressed to a set or class of men, and, therefore, does not support an action. (*Bourne's Case*, Rolle's Abr. 81.)

Henry W. Unger and *Abraham Levy* for respondent. A direct imputation of wrongdoing against all persons of a particular body is a libel upon every one of the persons constituting the body. (*Ryckman* v. *Delavan*, 25 Wend. 186; *Gedney* v. *Blake*, 11 Johns. 54.)

HISCOCK, J. This action was brought to recover damages for an article alleged to be libelous and to have been published by the defendant of and concerning the plaintiff as a coroner's physician or deputy coroner of the city of New York.

The defendant by its demurrer urges the proposition that the article published by it was not addressed to the plaintiff or to any particular individual, but was addressed to a course of conduct claimed to prevail in a public office; that the alleged defamatory words were written of a certain set or class of men and that plaintiff as an individual cannot maintain this action simply because he belonged to that set. The demurrer and this argument based upon it have thus far been overruled, and, as we think so correctly, that the judgment appealed from should be affirmed.

At the time of the publication of the article there were four coroners in the borough of Manhattan and a qualified physician appointed by each coroner as a coroner's physician. Plaintiff was one of these physicians or, as they were sometimes designated, deputy coroners.

On or about February 2, 1905, one Jackson, then being a coroner for said borough, was convicted of the crime of attempt at bribery. Thereafter and upon February 20, 1905, the article in question was published which, stripped of all allegations by way of introduction and innuendo, read in part as follows:

"Says Graft Rules the Coroners. Former Bureau Official Declares 'System' Runs Perfectly; 'Hush Money' Abundant; $500 or even $1,000 Paid by Hotels to Keep Suspicious Cases out of Papers; Death Coined into Cash; Men enter Bureau with a 'Shoe String' and Leave with Comfortable Fortunes.

"'The Coroner's office,' said a former prominent official of that office, while discussing it to-day in connection with the recent conviction of Dr. Jackson, 'is a hot-bed of corruption in which the system runs more freely than in any other department, not excepting even the Police Department. The

'system' runs in the coroner's office with absolute impunity. It pervades the entire office, but I should say that the most of the graft goes, not to the underlings, but to those higher up.'" Then followed a purported statement in detail of the manner in which the corrupt system said to prevail in said office was carried on, including the following: "'Say a young girl dies suddenly from purely natural causes. The death is reported and the coroner's physician goes to the house. He looks at the body, examines it, questions the members of the family and becomes convinced that there is nothing suspicious in the death and that a permit for the burial may be issued. But where is he going to come in? Looking at the anxious father and mother he shakes his head and says with a note of pity in his voice, 'I'm afraid the body will have to be removed to the morgue. I'm sorry, but it is evidently a case for an autopsy.' Can't anything be done? 'Oh, Coroner!' or 'Oh! Doctor,' the parents exclaim, 'can't anything be done to save us this? It will break our hearts! And the shame of it! She died a natural death and there is no need of an autopsy. Is there no way of saving us?' 'It's too bad, really, but I must perform my duty no matter how disagreeable it is,' replies the coroner or his deputy, in a sympathetic way, and with still another note in his voice as he moves towards the door. Then there is a hurried conversation among the members of the family. The mother disappears, reappears and sidles up to her husband and he in a moment is beside the departing official who has not yet reached the door. 'I'm very sorry, doctor, that nothing can be done,' and without a moment's delay comes the response, 'Oh, that will be all right,' and the official is gone. The poor family have given up a badly needed $5 bill, but they have saved a loved one's body from the morgue; the official quietly chuckles to himself as he makes his way to the street $5 is $5.'"

Then followed still further statements of the manner in which this same system upon a larger scale of payments was employed in extracting money from proprietors of hotels where deaths had occurred liable to attract suspicion or occa-

sion notoriety and in which specific reference was made to the coroner and his physician as guilty of these iniquitous practices.

Then still further we find: "'In the coroner's court,' added the former official, 'the same 'long green' has a far reaching effect. This is the evidence of the coroner's physician which may be affected by it and the charge of the coroner to the jury. In fact, there are a hundred and one ways in which money will tell.' 'But what are you going to do about it?' asked the former official. 'Abolish the coroner's office? Not a bit of good. It would only turn the graft into the pocket of some other person or persons. Official corruption is widespread and every man seems to be out for the 'almighty dollar.'"

Proper allegations are employed in the complaint alleging the identity of plaintiff and the relation to him of the various statements in the article.

So far as we are aware there is no particular controversy about the general principles of law which are applicable to such an alleged libelous article and which distinguish between one relating to a body or a class and one pointing at an individual. The distinction between an article censuring or satirizing an entire class or body of individuals and one which aims defamatory statements at an individual is well settled. The former may not be made the basis of an action for individual damages, and the latter may. As it was expressed in *Ryckman* v. *Delavan* (25 Wend. 186), in terms which advantageously may be quoted now: "General censure or reproof, satire or invective, whether on moral, theological, or political grounds, cannot ordinarily be prompted by individual malice or intended to produce personal injury. * * * The principle upon which the civil remedy is allowed does not apply here, and the great interests of society require that it should not be made to apply. It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals or faith, should

be checked by the dread of embittered and boundless litigation. * * * Yet it does not thence follow, because a man is libeled — not by name or title or other specific description of himself, but under some such description of persons as includes certain other persons, and marks the individuality of each of them as much as if they were all severally named — that, therefore, this is no libel, having a personal application upon which a civil suit can be maintained. The application of the injurious charge to a particular person must be made on the same principle that the meaning of the charge itself is explained. Both are to be taken according to the common understanding of men and the customary use of language. * * * If it appears clearly and undeniably on the plaintiff's own declaratory statement of his case, that the charge was made against a whole body of men, such as lawyers, clergy or brewers, etc., this is not a libel upon any individual of that class, and the courts must so pronounce it. But if the words may by any reasonable application import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide whether the charge has the personal application averred by the plaintiff."

When we test the article in question by the principles thus enunciated, we believe that a jury fairly might be permitted to say that it sufficiently identified and pointed at the plaintiff to be libelous of him, although it did not in terms name him. The article must be assumed to have related to conditions as they existed at the time of its publication. Plaintiff then was one of four coroners' physicians in the borough of Manhattan. The article was written at a time when the criminal conviction of a coroner was apt to attract close and unfavorable attention to the office and its occupants. It detailed with great particularity the manner in which unlawful and iniquitous practices were employed to secure illegal gains, and more than once specifically mentioned the coroner's physician as employing these means. In addition, it stated that these criminal practices pervaded "the entire office," but that "most

of the graft goes, not to the underlings, but to those higher up." We do not think we could well say as a matter of law that this language was employed in criticism of some body or class or in relation to general conditions and that it had no personal and individual application or significance. It seems to us, upon the other hand, that a jury would be justified in saying that this language, which described these corrupt practices with specific designation by their titles of the officers who employed them, and which stated that they pervaded "the entire office," applied to every individual then in that office, and accused every one of them, including the plaintiff, as a coroner's physician, of being implicated in them. Very likely an article which stated in general terms that all the coroners in the state were a bad and corrupt lot would not be libelous as against some individual who happened to be a member of the office somewhere. Upon the other hand, if an article stated in so many words that every one of the four coroners and of the coroners' physicians at a given time occupying office in the city of New York was corrupt and took bribes, we apprehend that there would be no serious controversy over the proposition that any one of those individuals might maintain an action. The question here is whether the article complained of is analogous to the first or to the last article assumed. It seems to us more nearly akin to the last one, and certainly it would be within the province of the jury to give such meaning, construction and application to the language used as would bring it within the principles permitting this action to be maintained.

The case of *Bornmann* v. *Star Co.* (174 N. Y. 212) has been referred to by the respondent as especially decisive of the merits of this demurrer. We agree, however, with the learned counsel for the appellant that the discussion in that case did not proceed especially upon the question here involved. The divergence in opinion between different members of the court arose over other points. Still, the prevailing opinion was based upon assumptions which, so far as applicable, do tend to sustain the sufficiency of plaintiff's complaint.

The judgment of the Appellate Division, affirming the interlocutory judgment of the Special Term, must be affirmed, with costs, and upon payment of such costs the defendant shall have leave to answer within twenty days.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur.

Judgment affirmed.

ISABEL A. HOLMES, Respondent, *v.* EGBERT B. SEAMAN, Appellant.

SAME, Respondent, *v.* SAME, Appellant.

1. NEW YORK PRODUCE EXCHANGE — BENEFICIARIES' INTEREST IN GRATUITY FUND ASSIGNABLE AS SECURITY FOR SUMS ADVANCED TO PAY DUES AND ASSESSMENTS. Under a by-law of the New York Produce Exchange, relating to the gratuity fund established pursuant to chapter 36 of the Laws of 1882, which provided that "Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts; but it shall be construed as the solemn agreement of every subscribing member of the New York Produce Exchange to make a gift to the family of each deceased member, and of the exchange to collect and pay over to the family the said gift," while the interest of beneficiaries in such fund cannot be assigned in payment or to secure the payment of a debt having no relation to such fund and in nowise incurred for the purpose of keeping alive their interests in the fund, it is assignable, however, as security for the repayment of such moneys as may be paid by another to keep alive such interests, and without which they must have been absolutely destroyed.

2. SAME. Where the family of a member assigned their interest in the fund to secure his pre-existing personal indebtedness and also "all further sums" which the assignee should during the lifetime of the member pay to the Exchange for "dues or assessments" upon his certificate, and for several years they were paid by the assignee, in an action to determine the title to the fund as between him and the beneficiary, *held*, that the assignment was ineffectual as security for the former indebtedness, but was effectual as to the sums advanced for the dues and assessments necessary to keep the interest of the beneficiary alive.

Holmes v. *Seaman*, 99 App. Div. 624, reversed.

(Argued March 6, 1906; decided April 17, 1906.)

APPEAL in each of the above-entitled actions from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 4, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee. The actions were tried together by consent and the evidence is the same in both.

The first of these actions is brought to recover the sum of $2,500.00, and the second to recover the sum of $6,798.34, which the plaintiff alleges that she was induced to pay to the defendant by wrongful acts and representations on his part and without consideration.

In 1886 the plaintiff's father, John A. Holmes, and the defendant were members of the New York Produce Exchange and subscribers to its gratuity fund. Holmes was indebted to the Oriental Bank in the sum of $2,350.00 and the bank held his certificate of membership in the Produce Exchange as security for the loan. The defendant loaned Holmes sufficient money wherewith to pay that indebtedness and Holmes transferred to the defendant his certificate of membership. Thereafter, from 1886 until 1891, the defendant paid to the New York Produce Exchange in behalf of Holmes his yearly dues and the assessments called for by the trustees of the gratuity fund. The value of the membership certificate had declined in that period to such an extent that the defendant deemed it doubtful security for the indebtedness and he thereupon suggested to Holmes that he should be further secured by a transfer of the interest in ten thousand dollars ($10,000.00) which under the by-laws of the Produce Exchange would be payable out of the gratuity fund to the wife and daughter of Holmes upon his death. Thereupon, under date of April 13th, 1891, an instrument was executed by the wife of Holmes (since deceased) and his daughter (the plaintiff herein) whereby they assigned to the defendant "so much of our respective right, title, interest, claim and demand in, to and over any and all moneys that may hereafter become or grow due or owing to us or either of us from the said New York Produce Exchange, its Trustees or Managers, or from the trustees of

the gratuity fund of the said Exchange by reason of our being respectively the wife and daughter of the said John A. Holmes" as should be necessary to repay to the defendant the sum of $3,614.00 (representing the Oriental Bank debt) with interest, "and all further sums which he, the said Egbert B. Seaman, shall, during the lifetime of the said John A. Holmes, pay to the said Produce Exchange or the Trustees of the gratuity fund thereof for dues or assessmnts" upon Holmes' certificate.

For nearly ten years after the execution of this instrument, namely, up to March 31st, 1901, when Holmes died, the defendant paid the dues upon his certificate and the assessments against him on account of the gratuity fund. Meantime the wife of Holmes had died. On April 5th, 1901, the defendant procured the daughter (the plaintiff herein) to execute another instrument purporting to transfer to him such moneys due or to grow due to her from the New York Produce Exchange by reason of her being the daughter of John A. Holmes, deceased, as might be sufficient to pay to him the sum of $3,614.00 for borrowed money mentioned in the instrument of April 13th, 1891, and also the further sum of $2,014.00 for dues or assessments and interest thereon from the date upon which the various dues and assessments were paid by Holmes.

Upon these two instruments the defendant obtained $2,500.00 from the New York Produce Exchange. There remained payable on account of the interest of Holmes in the gratuity fund $6,823.34. The defendant claimed to be entitled to receive this balance, or a large portion thereof, by reason of the advances made by him during the lifetime of Holmes to keep alive his membership in the exchange and his interest in the gratuity fund. The New York Produce Exchange paid the money into court to await the determination of this controversy as to the rights of the respective claimants. The plaintiff seeks in these actions to recover as against the defendant the $2,500.00 already paid to him out of the gratuity fund and to establish her title to the balance thus paid into court.

The actions were tried together before a referee, who found the facts substantially as hereinbefore stated, and found further that the first instrument or assignment of April 13th, 1891, was signed and delivered by the plaintiff in ignorance of her rights, and that the assignment or instrument of April 5th, 1901, was procured by representations and conduct on the part of the defendant which were calculated to and did mislead and deceive the plaintiff. He further found as conclusion of law that the first assignment of April 13th, 1891, was void and that the second assignment of April 5th, 1901, was voidable at the election of the plaintiff, and he directed judgment, and judgment was entered in action No. 1 for the recovery of $2,500.00 with interest, and, in action No. 2, declaring that the defendant had no claim upon and was not entitled to the balance of the gratuity fund paid into court by the New York Produce Exchange. These judgments have been affirmed by the Appellate Division by a divided court.

Albert Stickney for appellant. The first assignment, as to which there is no charge of fraud, made by plaintiff and her mother to secure past and future advances, followed by advances made on the faith thereof, which were used to preserve the existence of the entire interest in the gratuity fund, operated as an equitable assignment of that interest when the same should become payable to the plaintiff, so far as was necessary to repay the advances. (*Kimball* v. *Lester*, 43 App. Div. 27; affd., 167 N. Y. 570; *Dexter* v. *Supreme Council*, 97 App. Div. 545; *Webster* v. *Welch*, 57 App. Div. 558; *McCord* v. *McCord*, 40 App. Div. 425.) The assignment being, in terms, of all "moneys" that may hereafter become or grow due, constituted in equity a specific appropriation of the moneys constituting the fund, when they should become ascertained and payable under the by-laws of the Produce Exchange. (*Field* v. *Mayor*, 6 N. Y. 179; *Stover* v. *Eyeleshimer*, 3 Keyes, 620; *Hirsh* v. *Auer*, 146 N. Y. 13.) The first assignment being enforceable in equity, the charge of

fraud as to the second assignment, which in its fullest extent consists of a charge that the defendant insisted on the validity of the first assignment, becomes of no effect. (*Arthur* v. *Griswold*, 55 N. Y. 400; *Brackett* v. *Griswold*, 112 N. Y. 454; *Henry* v. *Henry*, 8 Barb. 588.) A separate and distinct ground for refusing the plaintiff any equitable relief is found in the fact that the plaintiff refuses to do equity, in that she seeks to deprive the defendant of any and all interest in the fund which owes its existence to the advances made by him on the faith of the original assignment, as to which no fraud is alleged. (*Gould* v. *Cayuga Bank*, 86 N. Y. 75; *Graham* v. *Meyer*, 99 N. Y. 611; *McQuiddy* v. *Ware*, 20 Wall. 14; *Thomas* v. *B., etc., R. R. Co.*, 109 U. S. 522.)

George W. Weiffenbach for respondent. The so-called first assignment is inherently void. (*McCord* v. *McCord*, 40 App. Div. 275; *Eadie* v. *Slimmon*, 25 N. Y. 9; *Barry* v. *E. Life Ins. Co.*, 59 N. Y. 587; *Barry* v. *Brune*, 71 N. Y. 261; *Brummer* v. *Cohn*, 86 N. Y. 11; *Smillie* v. *Quinn*, 90 N. Y. 492; *Baron* v. *Brummer*, 100 N. Y. 372; *Frank* v. *M. L. Ins. Co.*, 102 N. Y. 266; *Brick* v. *Campbell*, 122 N. Y. 357; *Bull* v. *Case*, 165 N. Y. 578.) The equities are against defendant. (1 Pom. Eq. Juris. [2d ed.] §§ 403, 404.)

WILLARD BARTLETT, J. The gratuity fund of the New York Produce Exchange was established pursuant to chapter 36 of the Laws of 1882, which authorized the corporation to make provision for the widows and families of deceased members, and provide for an assessment of such sum as should be fixed in the by-laws of the corporation upon the death of any member, which sum or such proportion thereof as the by-laws might provide, and such proportion of the surplus income of the corporation as the by-laws might provide, might be paid to the widow, children, next of kin or other persons dependent upon said deceased member, in such manner as the by-laws should prescribe.

Among the by-laws relating to the gratuity fund estab-

lished under the authority of this statute, was the following: "Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts, but it shall be construed as the solemn agreement of every subscribing member of the New York Produce Exchange to make a gift to the family of each deceased member, and of the exchange to collect and pay over to the family the said gift."

The language of this by-law is such as to constitute a clear and unmistakable prohibition against the assignment or pledge by the beneficiaries of any interest in the gratuity fund of the New York Produce Exchange in payment or to secure the payment of a debt having no relation to such fund and in no wise incurred for the purpose of keeping alive the interest of the beneficiaries in such fund. So far, therefore, as the first assignment assumed or purported to charge the interest of the plaintiff in the gratuity fund with any liability on account of the debt to the Oriental Bank of $3,614.00 owing by Holmes to the Oriental Bank and paid by the defendant, together with the interest thereon, that assignment was ineffectual, and to that extent the referee was right in adjudging it to be void.

In the same instrument, however, and wholly irrespective of the contents of the second assignment, the plaintiff expressly authorized and empowered the New York Produce Exchange, its trustees and managers, or the trustees of the gratuity fund, to pay over to the defendant not only the said sum of $3,614.00 with interest thereon, but "such further sums of money as he, the said Egbert B. Seaman, shall or may pay to the said Produce Exchange or the Trustees of the gratuity fund thereof, hereafter, for or on account of dues or assessments upon the said certificate, together with interest on each of such payments from the date thereof," and the principal question presented upon this appeal, in the view which we take of the controversy, is whether or not this portion of the instrument was effectual to constitute a legal charge or lien upon the plaintiff's interest in the gratuity fund to the extent of the

sum paid out by the defendant to the Produce Exchange upon the faith of the instrument and for the purpose of keeping the plaintiff's interest in that fund alive.

The referee has answered this question in the negative on the authority of *McCord* v. *McCord* (40 App. Div. 275). In that case the assignment was made during the life of the member of the Produce Exchange by his wife, who was the sole beneficiary of the fund, and the husband joined in the assignment. The instrument was executed to secure the plaintiff for advances made or to be made, and the evidence tended to show that the plaintiff made advances upon the faith of the assignment partly for the support of the member and his wife and partly to pay assessments imposed upon the member under the gratuity plan. The Appellate Division held that the member's interest in the gratuity fund was not thus assignable, and Mr. Justice BARRETT, who wrote the opinion of the court, quoted the language of CULLEN, J., in *Kemp* v. *New York Produce Exchange* (34 App. Div. 175), where he said: "The by-laws provide, in express terms, that nothing therein contained shall be construed as constituting any interest which can be mortgaged or pledged for the payment of any debt. Equally it was incapable of assignment. It was the intention to create provision for the family of the deceased member, which should be beyond the hazard of loss from pecuniary misfortune."

So far as the *McCord* case decides that a beneficial interest in the gratuity fund of the New York Produce Exchange could not be assigned as security for a pre-existing debt, and that no valid charge could be made thereon for any future indebtedness outside of payments necessary to keep alive the interest of the beneficiaries in the fund, we think that the decision was correct. We are unable to approve it, however, so far as it denies to a beneficiary in the gratuity fund the power to charge his interest with the repayment of such amounts of money as may be paid by another to maintain that interest in existence, and without which payments it must have been absolutely destroyed.

To hold that this may not be done would be to defeat the manifest purpose of the by-laws, as expressed by Mr. Justice CULLEN in *Kemp* v. *New York Produce Exchange* (*supra*), where he declared it to be the intention to create a provision for the family of a deceased member which should be beyond the hazard of loss from pecuniary misfortune. Take the case of the wife or child of a member of the exchange who had paid his dues and assessments for years and suddenly found himself unable to pay them any longer. The wife or child is equally destitute. None of the parties in interest has any means whereby to provide for the payment of the assessments, without which the right of the wife or child to receive anything whatever from the gratuity fund will at once cease and determine. If the provision in the by-laws against any assignment is deemed to be a prohibition against creating a charge upon the beneficial interest which will reimburse a third party for advances made to prevent its destruction, then under such circumstances all that has been paid by the member during his lifetime will go for naught, and the widow or orphan will be left penniless. A construction which will have this effect should not be adopted unless it is the only construction of which the by-law is capable. Taking into consideration the plain object in view in the establishment of the gratuity fund and the enactment of the by-law, we think it must be held to warrant and justify the creation of such a charge as was made upon it by the execution of the first assignment in this case.

The referee's finding to the effect that this assignment was signed and delivered by her in ignorance of her rights does not import any fraud or misrepresentation in fact, but is plainly based upon the proposition, which we deem erroneous, that the instrument was ineffectual in law. As we regard this first instrument as amply sufficient of itself to charge the plaintiff's interest in the gratuity fund with the sum thereafter paid out by the defendant to keep it alive, the circumstances under which the second assignment was obtained become wholly immaterial. Upon the evidence in the two

cases the defendant was entitled to receive out of the plaintiff's interest in the gratuity fund the aggregate of all the amounts paid by him after the execution of the assignment on account of dues upon Holmes' certificate of membership and the assessments against Holmes on account of the gratutity fund with interest upon such payments from the dates at which they were made. He was not entitled to receive anything on account of the debt of Holmes paid to the Oriental Bank or interest thereon. The whole of the amount payable out of the gratuity fund on account of Holmes' membership was payable to the plaintiff less the sum heretofore mentioned as due to the defendant on account of the amounts paid by him to save the plaintiff's interest.

The judgment in each action should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ., concur.

Judgment reversed, etc.

HENRY KOSTER, a Taxpayer of the City of Yonkers, Appellant, *v.* JOHN H. COYNE, as Mayor of the City of Yonkers, et al., Respondents.

1. CITIES — CONSTITUTIONAL LAW — STATUTE (L. 1905, CH. 501) AMENDING "WHITE CHARTER" CONSTITUTIONAL, ALTHOUGH NOT TRANSMITTED TO CITIES AFFECTED THEREBY (CONST. ART. 12, § 2). The statute (L. 1905, ch. 501) amending the "act for the government of cities of the second class" (L. 1898, ch. 182), commonly called the "White Charter," so that the provisions thereof shall not apply to any city that becomes a city of the second class in the enumeration to be had in the year 1905, until on and after the 1st day of January, 1908, except that the officers provided in such act for such city as becomes a city of the second class after such enumeration shall be elected at the city election to be held on the Tuesday succeeding the first Monday in November, 1907, is constitutional, although a certified copy thereof was not transmitted to any city or cities affected thereby, as required by the Constitution (Art. 12, § 2) in case of special city laws; since such statute is a general, not a special, city law under the provisions of said section defining general city laws as "those which relate to all the cities of one or more classes," and special

city laws as those "which relate to a single city or to less than all the cities of a class." By its express terms the statute relates to all of the cities of the state, not then in the second class, which might thereafter come into that class as a result of the enumeration in 1905, so that all of such cities might have a reasonable time to adapt their government to the changed conditions.

2. YONKERS (CITY OF) — EFFECT OF STATUTE (L. 1905, CH. 501) WHEN YONKERS BECAME A CITY OF THE SECOND CLASS UNDER ENUMERATION OF 1905. Under the enumeration taken in 1905 the city of Yonkers, previously a city of the third class, governed by a special charter which provided for the election of two aldermen from each ward, became a city of the second class, but the statute (L. 1905, ch. 501) which amended the "White Charter," prevents the original provisions of that charter from so applying to the city of Yonkers as to reduce the number of aldermen from two to one in each ward until January 1, 1908.

3. SAME — CONSTRUCTION AND EFFECT OF PROVISIONS OF CONSTITUTION (CONST. ART. 12, § 3) UPON CHARTER PROVISIONS RELATING TO ELECTION AND TERMS OF ALDERMEN — PROCEEDINGS TO FILL VACANCY IN OFFICE OF ALDERMEN. The provisions of the Constitution (Const. art. 12, § 3) providing that "all elections of city officers * * * except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the term of every such officer shall expire at the end of the odd-numbered year," apply to the election of aldermen and are mandatory; when the city of Yonkers became a city of the second class it became subject to those provisions and was required to elect aldermen on the Tuesday succeeding the first Monday in November, 1905, whose terms would expire at the end of 1907; the terms of the aldermen elected in such city in 1904 for the term of two years to expire in December, 1906, were abridged so as to expire, at the latest, with the last day of December, 1905; but the offices to which such aldermen had been elected were not thereby abolished; until the provisions of the "White Charter" took effect providing for the election of aldermen in November, 1907, to take effect January, 1908, the provisions of the original special charter of the city of Yonkers continued in force and provided for the election of two aldermen from each ward; when, therefore, one of the aldermen of a ward, elected in 1904, for the term of two years, was elected mayor of the city at the election held in November, 1905, and resigned his office as alderman on the thirteenth of that month, there was, consequently, a vacancy and the common council had the power to order a special election to fill such vacancy for a term which will expire December 31, 1907.

4. RESOLUTION ORDERING SPECIAL ELECTION OF ALDERMAN TO FILL VACANCY — IMMATERIAL ERROR. Although the resolution of the common council, ordering such special election and describing the vacancy to be filled as one "for the unexpired term of two years commencing

December 1st, 1904, and ending November 30th, 1906," was erroneous because such term, under the constitutional and statutory provisions applicable thereto, expired in 1905 instead of 1906, such error is to be regarded as an immaterial irregularity which does not affect the validity of the proceedings for such special election.

Koster v. *Coyne*, 110 App. Div. 742, affirmed,

(Argued March 8, 1906; decided April 17, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered February 1, 1906, which reversed an order of Special Term enjoining *pendente lite* a special election to fill an alleged vacancy in the office of alderman of the second ward of the city of Yonkers.

The following questions were certified: "1. Is chapter 501 of the Laws of 1905 constitutional?

"2. Does section 3 of article 12 of the State Constitution affect the term of the alderman of the second ward of the city of Yonkers, elected in November, 1904, and did the term of said office expire on December 31st, 1905?"

The facts, so far as material, are stated in the opinion.

John F. Brennan for appellant. Chapter 501 of the Laws of 1905, which sought to suspend the operation of the second class city charter until January 1, 1908, is unconstitutional. (Const. of N. Y. art. 12, § 2; *Matter of Church*, 92 N. Y. 4; *Matter of Henneberger*, 25 App. Div. 168; 155 N. Y. 424; *Matter of N. Y. & L. I. B. Co.*, 148 N. Y. 540; *People ex rel. Einsfeld* v. *Murray*, 149 N. Y. 367; *Chrystal* v. *Mayor, etc.*, 63 App. Div. 98; *Cahill* v. *Hogan*, 180 N. Y. 304; *People ex rel. Eldred* v. *Palmer*, 154 N. Y. 133; *Long* v. *Mayor, etc.*, 81 N. Y. 425; *People ex rel. Gere* v. *Whitlock*, 92 N. Y. 198.)

Thomas F. Curran for John H. Coyne et al., respondents. Chapter 501 of the Laws of 1905 is constitutional. (*Pryor* v. *City of Rochester*, 166 N. Y. 548; *People ex rel. City of Rochester* v. *Briggs*, 50 N. Y. 553; *Actor* v. *A. R. Co.*, 113

N. Y. 93; *Ferguson* v. *Ross*, 126 N. Y. 459.) Chapter 501 of the Laws of 1905, being constitutional, the city of Yonkers is governed by its special charter (L. 1895, chap. 635), pursuant to the provisions of which charter an election to fill the vacancy in the office of alderman of the second ward must be held. (*People* v. *Fitzgerald*, 180 N. Y. 269)

James M. Hunt for John H. Southwick et al., respondents. Chapter 501 of the Laws of 1905 is not unconstitutional or void, but is legal, binding and operative, and effectually postpones the operation of the White charter in the city of Yonkers until January 1, 1908. (*Pryor* v. *City of Rochester*, 166 N. Y. 548; *McGrath* v. *Grout*, 171 N. Y. 7.)

Francis A. Winslow and *William J. Wallin* for Daniel J. Cashin et al., respondents. Chapter 501 of the Laws of 1905 is constitutional. (*People ex rel. City of Rochester* v. *Briggs*, 50 N. Y. 553; *Actor* v. *A. R. Co.*, 113 N. Y. 93; *Ferguson* v. *Ross*, 126 N. Y. 459.) Chapter 501 of the Laws of 1905 being constitutional, the city of Yonkers is governed by its special charter (L. 1895, ch. 635), pursuant to the provisions of which charter an election to fill the vacancy in the office of alderman of the second ward must be held. (*People ex rel. Eldred* v. *Palmer*, 154 N. Y. 133; *People* v. *Fitzgerald*, 180 N. Y. 269.)

Charles Philip Easton for Board of Education of the City of Yonkers, intervening. Chapter 501 of the Laws of 1905 is constitutional and postpones the operation of the uniform charter for cities of the second class in the city of Yonkers until January 1, 1908. (*Pryor* v. *City of Rochester*, 166 N. Y. 548.)

HISCOCK, J. The order appealed from should be affirmed. While, as we understand it, the particular proceedings for a special election involved in this action have run down and have ceased to be a matter of practical consequence, the important questions raised with reference to them still remain

to be dealt with and, therefore, deserve our consideration at some length.

Prior to the census enumeration of 1905 the city of Yonkers was a city of the third class, governed by a special charter (Chapter 635, Laws of 1895.) This charter, amongst other things, provided for the election of two aldermen from each of the several wards. In accordance with these provisions, in the year 1904, the defendant Coyne was elected one of such aldermen from one of the wards for the term of two years, which would expire December 1, 1906. Having been elected mayor of the city at the election held in November, 1905, he thereafter, and upon the 13th day of said month, resigned his aldermanic office. Thereafter the common council attempted by resolution to provide for a special election to be held January 13, 1906, for the purpose of filling the supposed vacancy caused by such resignation and fixing the term to be filled as expiring Demher 1, 1906. This is the election which appellant has sought to enjoin.

He contends that there was no vacancy to be filled, and hence that said special election was unlawful, basing this contention upon two propositions:

First, he urges that, under the enumeration of 1905, Yonkers became a city of the second class and passed under the provisions of the White charter, so called (Chap. 182 of the Laws of 1898), which provided for only one alderman from each ward and abolished any vacancy to be filled by special election which otherwise might have resulted from Coyne's resignation of the second aldermanship.

And, in the second place, as we understand his argument, he urges that the provisions of section 3, article XII, of the Constitution, with reference to the election of municipal officers in odd-numbered years, somehow so affected the former office held by Coyne that there was no vacancy to be filled in 1906.

These claims require the consideration of various constitutional and statutory provisions and will be considered in the order stated.

The enumeration taken in 1905 indicated that the city of Yonkers had a population of over fifty thousand and less than two hundred and fifty thousand, and a proper certificate to that effect was filed October 5, 1905.

Upon the fulfillment of these conditions it became a city of the second class in accordance with the provisions of section 2 of article XII of the Constitution.

Under the provisions of the White charter, as originally adopted, the result claimed by appellant doubtless would have followed of the abolition of the right to two aldermen in each of the wards, and Mr. Coyne's resignation would have occasioned no vacancy to be filled. But by chapter 501 of the Laws of 1905 the original act for the government of cities of the second class was so amended as to provide that its provisions should "not apply to any city that became (becomes) a city of the second class in the enumeration to be had in the year 1905, until on and after the 1st day of January, 1908, except that the officers provided in such act for such city as became (becomes) a city of the second class after such enumeration, should (shall) be elected at the city election to be held on the Tuesday succeeding the first Monday in November, 1907," and which amendment took effect immediately.

Appellant seeks to avoid the obvious consequences of this amendment in postponing any abolition of or change in the municipal offices of the city of Yonkers under its original and special charter, by claiming that it was unconstitutional and invalid. This claim is based upon section 2 of article XII of the Constitution, which, in effect, divides laws relating to the property, affairs or government of cities into general and special city laws, and provides that special city laws shall not be passed until after a certified copy of any bill relating to a city has been transmitted to the mayor of said city and returned with a certificate whether the city has or has not accepted the same, etc. It is conceded that no copy of the amendment in question was ever transmitted to the mayor of Yonkers, and appellant's conclusions would be convincing if he were right in his assumption that this was a special city

law. We do not think, however, that such was its character in any degree whatever. The provision of the Constitution in question defines general city laws as "those which relate to all the cities of one or more classes," and special city laws as those "which relate to a single city, or to less than all the cities of a class." We are unable to see any force in the claim that under these definitions the amendment was anything less than a general law. By its terms it expressly related to all the cities of the state which might become cities of the second class under fixed conditions and at a future date. At the time it was adopted the enumeration referred to had not been completed and there was no way in which the legislature officially and legally could determine what cities would or would not come within its terms. It affected generally every city not then in the second class and which by any possibility might come into that class through the results of the enumeration then to be taken. In effect it considered all the municipalities of the state as constituting two classes, those then belonging to and those not belonging to the second class, and it was addressed universally and without discrimination to all of the latter. It was apparently adopted with the wise intention of giving cities a reasonable time within which to adapt their government to changed conditions, and no extended argument can make it plainer than do the very terms of the statute itself that it was general and not special legislation. The difficulties into which appellant's argument would lead from a practical standpoint occur to the mind at once when we ask how the legislature could have complied with the constitutional provisions requiring a copy of a special law to be sent to the mayor of a city and to what mayors of what cities it would have been necessary to send a copy of this amendment before the results of the enumeration of 1905 were known.

We, therefore, have no difficulty in determining that appellant's first contention is not a good one and that the amendment in question did prevent the original provisions of the White charter from so applying to the city of Yonkers at the

times in question in this proceeding as to reduce the number of aldermen to one from each ward, and we pass to the other point involved.

We believe that appellant is right, that section 3 of article 12 of the Constitution applied to the office held by the respondent Coyne in November, 1905. That section provides that "all elections of city officers * * * except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the term of every such officer shall expire at the end of an odd-numbered year." Said section also provides for such extension or abridgment of the terms of office of such officers elected before the 1st day of January, 1895, as will make them expire with the end of an odd-numbered year, also that the section shall not apply to any city of the third class.

This last clause does not exempt the city of Yonkers from the application of said section after it became a city of the second class as the result of the enumeration of 1905, and the filing of the certificate in October of that year.

It is true that the respondent Coyne had been elected for the term of two years in 1904, and before the city as one of the second class passed under the provisions of this section, and the section does not in specific terms provide for such a case. As is well understood, however, it was adopted in response to a general sentiment in favor of separating municipal from general elections in all large cities in the hope of securing better results in the former, and it is our duty to give such liberal construction as will carry out this policy and secure the application and enforcement of its provisions wherever possible.

The provision is mandatory in requiring that the election of such a city officer as an alderman shall be held in an odd-numbered year and that his term shall expire in an odd-numbered year. It is to be regarded as fairly applicable to all cases which might arise within its terms after its adoption, and when in October the city of Yonkers became a city of the second class, we see no difficulty in making it subject to

the provisions quoted and in holding that it was required to elect aldermen on the Tuesday succeeding the first Monday in November, 1905, whose terms would expire at the end of 1907, and that the terms of those aldermen elected in 1904 would expire at the outside with the last day of December, 1905. Unless this construction is adopted we shall have an anomalous condition of affairs. The city having become one of the second class, the provisions of the Constitution now under review would certainly be applicable in 1906 when the terms of the aldermen as originally fixed would expire and those provisions would prohibit an election in an even-numbered year. In addition, the provisions of the White charter already referred to would require an election of aldermen, one from each ward in November, 1907. Thus the only way of allowing aldermen to the city would be by permitting those whose terms expired in 1906 to hold over until November, 1907, or January, 1908. We do not think that this would be a good result or that it is required by a reasonable construction of all of the provisions applicable. The city was undoubtedly entitled to aldermen under some system for the period intervening between the expiration of the terms of office of those elected under the special charter before it became a city of the second class, and the date when it was entitled to elect aldermen under the provisions of the White charter, and the construction which we have adopted seems to secure this right in the way most natural and in accordance with the spirit of the constitutional provisions bearing upon this subject. It does not, however, at all follow that because these provisions abridged the terms of office of the aldermen elected in 1904, in the manner stated, they abolished the offices to which the latter had been elected. Until the provisions of the White charter took effect providing for the election of aldermen in November, 1907, to take effect January, 1908, the provisions of the original special charter of the city of Yonkers continued in force, and provided for the election of two aldermen from each ward. The office originally held by Mr. Coyne has not been filled, but is vacant, and there is no

reason why proper proceedings should not be taken to fill it for the term which will expire December 31, 1907.

The resolution of the common council ordering a special election described the vacancy to be filled as one "for the unexpired term of two years commencing December 1st, 1904, and ending November 30th, 1906." Under the construction which we have adopted, this description of the term of the vacancy to be filled was erroneous, as the term expired in 1905 instead of 1906. It is not urged, however, that this misdescription of the vacancy so affected the proceedings for a special election as to render them illegal and furnish a basis for the injunction which was obtained. Such contention could not be successfully made. The vacancy in the office of alderman existed at the time when the common council instituted the proceedings for a special election. The charter of the city of Yonkers required that body to institute proceedings for such election. The provisions of the Constitution and of the statutes which we have already considered defined and fixed the termination of the office to which an election was to be made. These provisions, of course, could not be changed or impaired by the proceedings of the common council. There does not seem to be any room for criticism upon the essential portions of the resolution called to our attention which provided for notice to the electors of the time and place and substantial object of the election to be held. Under these circumstances the error in describing the term of office to be filled is to be regarded at most as an immaterial irregularity which would not affect the validity of the proceedings which were made the subject of this action.

The order appealed from should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN and WILLARD BARTLETT, JJ., concur; WERNER, J., absent.

Order affirmed.

BYRON RAWSON, Respondent, *v.* FRANCIS H. LEGGETT et al., Appellants.

1. MALICIOUS PROSECUTION — WHEN PROBABLE CAUSE A QUESTION OF LAW. Where in an action to recover damages for malicious prosecution, the undisputed facts establish that the defendants were without malice and that after an investigation, which was cautious and painstaking in the extreme, they possessed knowledge of actual facts and acquired reliable information of apparent facts which fully justified them in instituting criminal proceedings, and in addition they received and must be assumed to have relied upon the advice of learned counsel including the district attorney, it must be held as a matter of law that the defendants were not guilty of malicious prosecution; and a judgment affirming a judgment in favor of plaintiff, entered upon a verdict, must be reversed.

Rawson v. *Leggett*, 97 App. Div. 416, reversed.

(Argued January 30, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 20, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alton B. Parker and *Edward S. Hosmer* for appellants. The complaint should have been dismissed. (*Thaule* v. *Krekeler*, 81 N. Y. 428; *Besson* v. *Southard*, 10 N. Y. 236; *Burns* v. *Erben*, 40 N. Y. 463; *Heyne* v. *Blair*, 62 N. Y. 19; *Bankell* v. *Weinacht*, 99 App. Div. 316; *Burt* v. *Smith*, 181 N. Y. 1; *Beacon* v. *Town*, 4 Cush. 328; *Carle* v. *Ayers*, 53 N. Y. 17.) There was no proof of malice. (*Heyne* v. *Blair*, 62 N. Y. 19; *Steward* v. *Sonneborn*, 98 U. S. 187; *McKown* v. *Hunter*, 30 N. Y. 625; *Bulkeley* v. *Smith*, 2 Duer, 261; *Vanderbilt* v. *Mathis*, 5 Duer, 304; *McCormack* v. *Perry*, 47 Hun, 71; *Thompson* v. *Lumley*, 50 How. Pr. 105.) Where a party communicates to the prosecuting officer of a state or county all the facts bearing on the case of which

he has knowledge, or could have ascertained with reasonable diligence and inquiry, and has acted on the advice received honestly and in good faith, the absence of malice is established, the want of probable cause negatived, and the action of malicious prosecution will not lie. (*Ravenga* v. *Mackintosh*, 2 B. & C. 693; Stephens on Mal. Pros. 43; *Hall* v. *Suydam*, 6 Barb. 88; *Thompson* v. *Lumley*, 1 Abb. [N. C.] 254; 64 N. Y. 631; *Stewart* v. *Sonneborn*, 98 U. S. 196; *Schipper* v. *Norton*, 38 Kan. 567; *Calef* v. *Thomas*, 81 Ill. 478; *Laughlin* v. *Clawson*, 27 Penn. St. 330; *Hess* v. *O. Co.*, 31 Oreg. 503; *Gilbertson* v. *Fuller*, 40 Minn. 413; *Genevy* v. *Edwards*, 55 Minn. 88; *Sebastian* v. *Cheney*, 86 Tex. 497; *Magowan* v. *Rickey*, 64 N. J. L. 402.)

Benjamin N. Cardozo, *Isaac N. Mills* and *Morris J. Hirsch* for respondent. The court did not err in holding that it was a question for the jury whether the defendants had instigated the prosecution without probable cause. (*Bopp* v. *E. V. Co.*, 177 N. Y. 33; *Hopkins* v. *Clark*, 158 N. Y. 299; *Wass* v. *Stephens*, 128 N. Y. 123; *Heyne* v. *Blair*, 62 N. Y. 19; *Fagnan* v. *Knox*, 66 N. Y. 525; *Owens* v. *N. R. C., etc., Co.*, 38 App. Div. 53; *Scott* v. *D. S. C. Co.*, 51 App. Div. 321; *Higgins* v. *Eagleton*, 155 N. Y. 466; *Place* v. *N. Y. C. & H. R. R. R. Co.*, 167 N. Y. 347; *Sundheimer* v. *Mayor*, 176 N. Y. 495.) The defendants cannot shield themselves by the plea that the indictment was found by the grand jury on the advice of the public prosecutor. (*Thompson* v. *Lumley*, 1 Abb. [N. C.] 254; *Ambs* v. *A., T. & S. F. Ry. Co.*, 114 Fed. Rep. 317; *Maynard* v. *Sigman*, 91 N. W. Rep. 576; *Truax* v. *Penn. Ry. Co.*, 58 N. J. L. 218; *Thurston* v. *Wright*, 77 Mich. 96; *Holden* v. *Merritt*, 92 Iowa, 707; *Tangrey* v. *Sullivan*, 163 Mass. 166; *Navarino* v. *Dudrap*, 50 Atl. Rep. 353; *Stewart* v. *Sonneborn*, 98 U. S. 187; *Hazzard* v. *Flury*, 120 N. Y. 223.) The contention that there was no evidence of malice is untenable. (*Heyne* v. *Blair*, 62 N. Y. 19; *Stewart* v. *Sonneborn*, 98 U. S. 187.)

Per Curiam. This action was brought for malicious prosecution. At the instigation of the defendants, as we shall assume upon this appeal, several indictments for grand larceny were found against the plaintiff in the county of New York, which were thereafter dismissed. Thereupon he brought this action and obtained a verdict for $25,000. It is insisted by the appellants that this result was erroneous and that plaintiff as matter of law failed to establish want of probable cause. A majority of the court concur in this view and think that the judgment should be reversed.

Appellants are and were wholesale grocers in the city of New York, having and carrying upon their books the accounts of many thousand customers. In 1901 and for some time prior thereto they had in their employ a salesman named Borchardt who made sales to and collections from a large number of customers. In November of said year it was discovered that during a period of about three years by manipulation of his customers' accounts and misappropriation of moneys collected from them he had stolen from his employers about $24,000, and criminal proceedings were instituted against him. It was the intention and custom of defendants to guard against such peculations as this upon the part of salesmen by sending every month to each of their customers a statement of account for comparison and verification, with the request to report any irregularities or discrepancies at the office, and not to the salesmen. In some manner these statements in the case of Borchardt's customers were wholly or largely suppressed and not sent, and thus the prompt discovery of his crime prevented.

During the period above mentioned and for a long time prior thereto plaintiff was in the employ of defendants as their head credit man, receiving a salary of $4,500 a year, and amongst other duties charged with those of looking after the accounts with customers and salesmen dealing with the latter. He assumed supervision over Borchardt's accounts and customers to the express exclusion of everybody except a member of the firm.

There has been no dispute in this litigation about the foregoing facts which, of course, were known to the defendants at the time they instituted the prosecution against plaintiff.

In addition, before instituting criminal proceedings, defendants knew, or personally or through their representatives were informed, of other real or alleged facts which, in connection with those already cited, are now claimed to have constituted a reliable and sufficient foundation for the assumption that plaintiff was guilty of the charges pressed against him. The existence of many of those facts and the correctness of the information relating thereto is not now challenged.

After his discovery and arrest, Borchardt made a confession both to Mr. Leggett and to others engaged in the investigation implicating plaintiff as a confederate in his crimes and as a partner to the extent of six or eight thousand dollars in the guilty proceeds thereof.

The monthly statements which should have been sent to Borchardt's customers were delivered by the bookkeeper to plaintiff, by whom, after being checked, they should have been delivered to addressing and mailing clerks.

Plaintiff and Borchardt were upon terms of great intimacy, which appeared to increase rather than decrease after the former concededly knew of the latter's crimes, and while plaintiff was still in the employ of the defendants. During the few months before Borchardt's apprehension, in the neighborhood of $1,600 were by him paid or passed to the credit of plaintiff.

In 1900 plaintiff consented that Borchardt should assume control of a certain account held by the defendants against one Yaeger, and although the moneys upon said account were collected by Borchardt in said year, no report or entry upon defendants' books was made to disclose these facts, and this account, amounting to several hundred dollars, made up part of the embezzlement. Subsequently, in proceedings threatened against Borchardt for perjury in claiming that he was the owner of defendants' account, plaintiff, when making an affidavit for his assistance, secured back from him or his attor-

ney a slip of paper which he had written, indicating his willingness to hold back Borchardt's slips (made in the discharge of his duty as salesman relating to his accounts) for a short period, because of his lack of funds.

In the midst of the investigation of Borchardt's crimes, plaintiff, without having, so far as appears, any other lucrative engagement, resigned his position and salary of $4,500 with defendants, and shortly thereafter left their employ.

The district attorney was made acquainted with the foregoing facts and information. Defendants occupied a considerable length of time in investigating the subject, and with the exception of one set of facts hereafter specially to be referred to, as to which the parties are in conflict, we think fairly and fully placed before the district attorney the knowledge and information possessed or acquired by them. In addition, the latter official, through one of his assistants, caused an extended examination to be made of many of the people who had knowledge of the facts or had supplied the information, and after this had been done he advised the submission of charges against Rawson to the grand jury with the resulting indictments heretofore mentioned.

Defendants expressly deny any malice towards plaintiff and assert their reliance upon the advice of counsel and especially of the district attorney in instituting the criminal prosecution which they undertook.

We think that upon all of the foregoing facts and others appearing in the record, to which we have not made specific reference, it must be held as a matter of law that defendants had probable cause to believe that Rawson was guilty of aiding Borchardt in the larcenies which were concededly committed, and were not guilty of any malicious prosecution.

Plaintiff especially challenges such conclusion and the propriety and legality of defendants' conduct in three respects, and insists that such case was made out for the consideration of the jury that the judgment should stand.

In the first place he urges that it was a question of fact whether Borchardt ever made any confession implicating

him and that even if he did it was still for the jury to say whether such confession was entitled to any credence as a basis for what was subsequently done. We cannot agree with this contention in either of its branches. The proof that the confession was made does not rest upon the evidence alone of Mr. Leggett, but is sustained by other evidence so ample and trustworthy that the jury would have had no right to disregard it. So, too, while this confession might be the subject of suspicion as dictated by Borchardt's personal interests, and would be insufficient of itself to furnish a basis for the prosecution of plaintiff, we think that it was so supported and corroborated by other facts appearing to exist at the time the indictments were found that defendants were entitled to rely upon it as furnishing in part a probable cause for complaint. (*Molloy* v. *L. I. R. R. Co.*, 59 Hun, 424; *Blunk* v. *A., T. & S. F. Ry. Co.*, 38 Fed. Rep. 311.)

In the second place, it is urged that taking into account plaintiff's long service with them and prior good character, defendants should have communicated with him before making any complaint and that if they had done so they would have learned that various transactions, upon the appearance of which they acted, were innocent as now claimed by plaintiff. For instance, he not only denies his guilt generally but he testifies that the moneys paid to him by Borchardt during the few months preceding the former's apprehension were loans and not proceeds of larceny; that the transaction of the Yaeger account was an innocent one undertaken for the purpose of collecting a debt due to the defendants; that his intimacy with Borchardt and his frequent visits to him after the discovery of his wrongdoing were in connection with the moneys loaned as above stated.

We are not prepared to assent to the proposition that a person having cause to believe that another has committed a crime must under all circumstances go to the latter, acquaint him with his suspicion and ask for his explanation of apparently unfavorable circumstances, or accept the risk of being found guilty of malicious prosecution if he does not do so. There

undoubtedly may be many cases where reasonable prudence would suggest such a course, and where the failure so to do might furnish, in part at least, the basis for holding the prosecutor guilty of unreasonable conduct. We do not think, however, that this is one of those cases. The defendants made their investigation with much patience and care, and it was not incumbent upon them under all of the circumstances to warn plaintiff of their suspicions and afford him the opportunity, if he so desired, to escape from the reach of any just prosecution. (*Kutner* v. *Fargo*, 34 App. Div. 317, 322.)

Lastly, the plaintiff urges certain facts, reference to which has been purposely reserved until this point, which must be assumed to have been within defendants' knowledge at the time plaintiff was indicted, and which it is claimed so strongly tended to establish the latter's innocence of the charges preferred against him as to raise an issue of lack of probable cause for the consideration of the jury.

Plaintiff testified that during the same period when Borchardt was making his conceded embezzlements from defendants, upon about ten occasions customers of Borchardt's who had received statements for verification and correction came to defendants' office and reported that the statements were not correct and their accounts not as carried upon defendants' books under Borchardt's directions, and that all of those facts were reported by plaintiff to defendants, who took up the investigation of said matters. And it is urged that it was so highly improbable that Rawson, if engaged in suppressing statements to some customers and helping Borchardt to embezzle from their accounts, would have reported occurrences of a precisely similar nature, that it was unreasonable to believe him guilty of the crimes with which he was charged; at least, that it was for the jury to say whether a person acting with reasonable care and prudence would have so suspected and charged him in the light of the facts mentioned.

We do not think, however, that such facts should be allowed to so far outweigh the other evidence in this case in favor of

the propriety of defendants' conduct as to create an issue for the jury. This evidence of Rawson's is emphatically denied by Mr. Leggett, and seems improbable. But, assuming its truth, it constitutes but a single feature of the case as presented, and is to be considered in the light of and in connection with all of the other testimony presented to us. The dominant features of the case remain undisputed, the embezzlement of Borchardt; that in the proceeds of that embezzlement the plaintiff shared, though he asserts innocently and ignorantly merely by loans from Borchardt, the intimacy between Borchardt and the plaintiff, the transaction in relation to the Yaeger account and the minor facts already recited.

When we take this survey of the complete record we are impressed, as stated at the beginning, that plaintiff has failed to meet the burden which rested upon him of establishing any malice upon the part of defendants or want of probable cause for the prosecution which was instituted against him.

The general principles which govern us and lead us to this conclusion are familiar and well settled.

The question is not whether plaintiff's evidence now given that he did not commit the crimes charged to him is true. The propriety of defendants' conduct in causing him to be indicted is to be decided by the facts as they appeared to be at the time the prosecution was instituted, and the question is whether these facts as they then appeared were such that a discreet and prudent person would have been led to the belief that the accused had committed the crime with which he was charged. If defendants had knowledge of facts actual or apparent strong enough to justify a reasonable man in the belief that they had lawful grounds for prosecuting the plaintiff in the manner complained of, then probable cause was present and this action will not lie. As was stated by Judge VANN in *Burt* v. *Smith* (181 N. Y. 1, 5): "The want of probable cause does not mean the want of any cause, but the want of any reasonable cause, such as would persuade a man of ordinary care and prudence to believe in the truth of the

charge. Probable cause does not necessarily depend upon the actual guilt of the person prosecuted, but may rest upon the prosecutor's belief in his guilt when based on reasonable grounds. One may act upon what appears to be true, even if it turns out to be false, provided he believes it to be true and the appearances are sufficient to justify the belief as reasonable. * * * If probable cause exists, it is an absolute protection against an action for malicious prosecution, even when express malice is proved."

Public policy requires that all persons should feel secure in the right to resort to courts for the apprehension and punishment of crimes, and this policy must be preserved and encouraged even though it result in occasional hardship to the individual, provided only that the prosecution has been free from malice and has been warranted by such facts, actual and apparent, as would lead a person of reasonable care and prudence to undertake it.

It is also well settled that where the facts are undisputed, the question of the existence of probable cause is one of law for the court rather than of fact for the jury. (*Thaule* v. *Krekeler*, 81 N. Y. 428; *Burt* v. *Smith*, *supra*.)

The undisputed facts in this case clearly establish to our mind that the defendants were without malice, and that after an investigation which was cautious and painstaking in the extreme, they possessed knowledge of actual facts and acquired reliable information of apparent facts which fully justified them in proceeding as they did. In addition, they received and must be assumed to have relied upon the advice of learned counsel, including the district attorney.

The judgment below should be reversed and a new trial granted, costs to abide event.

HISCOCK, J. (dissenting). I am unable to concur in the conclusion adopted by a majority of the court. If it were within our province to consider the weight of evidence or the measure of damages I very probably might reach the result attained by them even if by a different route. But, excluded

as we are from the consideration of those subjects, I think that it cannot be said as matter of law that plaintiff failed to establish lack of probable cause for his prosecution, and that, therefore, the judgment appealed from is erroneous.

I agree with the prevailing opinion that the evidence established beyond any question of fact the confession by Borchardt implicating plaintiff and that it was reasonable for defendants to take the same into account in connection with the other facts existing or appearing to exist. I also shall assume, without conceding it, that it was not incumbent upon defendants to make any inquiries of plaintiff which might have led to the explanation of the sums of money advanced to him by Borchardt and of the apparent intimacy between the two. I do not believe, however, that we can deprive plaintiff of the right to have a jury say whether the defendants had reasonable and probable cause to believe that he was helping Borchardt to embezzle from them in the light of the evidence that during this very period he was reporting to them irregularities in Borchardt's accounts with various customers.

Let me amplify somewhat the facts upon this point. Borchardt's embezzlements extended over a period of nearly three years and consisted in manipulation of his customers' accounts and of misappropriations of the collections therefrom. It is and was an essential element in defendants' theory of plaintiff's guilty participation in Borchardt's thefts that he suppressed the monthly statements which should have gone out to Borchardt's customers and which should have resulted in disclosure to defendants of the irregularities in the accounts. It is, of course, perfectly manifest that this suppression of statements was absolutely essential to the successful perpetration by Borchardt of his system of embezzlement. If the customers had received their statements showing that they had not been credited with the sums collected from them complaint at once would have been made to the firm with resulting detection. At the time of instituting their prosecution, defendants reasoned and even now argue most strenuously

that plaintiff was the only unchanging factor in the process by which these statements should have been placed in the hands of customers and that he must have suppressed them. In assuming plaintiff's guilt no fact outside possibly of Borchardt's confession received greater consideration by defendants than the one that plaintiff received these statements from the bookkeeper and hence that he must have taken part in suppressing them and that, therefore, he was guilty of complicity in the crimes committed. Defendants' assumption of plaintiff's guilt inevitably involved the supposition that he was interested in and had taken part in suppressing any acts which might lead to the discovery of Borchardt's irregularities.

Now, upon the other hand, we have the fact that during this very period upon at least ten occasions verification statements sent out to Borchardt's customers resulted in complaints to the plaintiff of irregularities in those accounts and that he duly and promptly reported these things to Mr. Leggett. It is argued that this evidence of plaintiff is denied by Mr. Leggett; that it is unreasonable and must be untrue. I do not think, however, that it can be disposed of in any such way as that. Upon a consideration of the weight of evidence, I might fully agree with this argument advanced by the learned counsel for the appellants. But that question is not before us. The evidence is in the case, and however contradicted or however unreasonable, we must, for the purposes of this appeal, assume it to be true.

Neither can it be erased from the record within the principles of *Linkauf* v. *Lombard* (137 N. Y. 417) as being a mere scintilla of evidence. It is positive, direct testimony of a witness to facts claimed to be within his personal knowledge, and as such, if it is sufficient to raise any issue, must be disposed of by a jury.

Appellants' counsel says that this evidence of plaintiff is absurd upon the face of it; that defendants would never have retained Borchardt in their employ if they had learned of irregularities in his accounts. The answer in plaintiff's evidence to this suggestion, in substance, is that the irregularities

were not very large, and that Borchardt made explanations which satisfied Mr. Leggett. That explanation may be reasonable or absurd. The reasonableness and truthfulness of the testimony is for the jury. (*McDonald* v. *Met. St. Ry. Co.*, 167 N. Y. 66.)

In deciding, as is virtually being done, that plaintiff should have been nonsuited, we must assume the truthfulness of any evidence produced by him, and give him the benefit of all reasonable inferences therefrom. Doing this, we, therefore, have it that at the very time when defendants assumed he was aiding Borchardt in his embezzlements and suppressing statements to customers, thereby preventing detection of these embezzlements, plaintiff was permitting statements to go out to other customers, and was reporting to defendants the irregularities which were discovered as the result of such latter statements. In other words, at the time when defendants charged plaintiff with aiding and abetting Borchardt to embezzle collections from customers' accounts in a certain method, they knew, as we must assume upon this argument, that he had called to their attention upon many occasions precisely similar irregularities in Borchardt's accounts; that he had given to them the precise information which was liable to lead to the detection of the very crimes for which a prosecution was then being instituted against him.

It is not natural for a criminal, voluntarily and intentionally, to give the information which will lead to the detection of the crimes in which he is engaged. It does not seem probable that if plaintiff was engaged in the commission of the offenses for which he was being prosecuted that he would at the same time be giving the information which ought to lead to their discovery. It does not seem as if the person considering prosecution would have probable cause to believe that the person engaged in criminal offenses would at the same time commit such contradictory acts. At least it cannot be said as a matter of law that a prosecutor had probable cause to assume guilt in the presence of acts upon the part of the supposed criminal so at variance with his guilt. It would be the

province of a jury as a question of fact to reach this conclusion, if it could be reached at all.

It is said in the prevailing opinion that the facts are undisputed, and that this being so the existence of probable cause is to be decided as a matter of law. If the facts are not only undisputed, but permit no divergent inferences, this is undoubtedly the rule; but where the facts, although not directly contradictory still are of such a nature that different men might draw different inferences, it is the general rule that a jury must say which inferences are to be drawn, and this rule, as I understand it, is applicable to such a case as this upon the issue of probable cause. (*Salt Springs Nat. Bank* v. *Sloan*, 135 N. Y. 371, 384; *Waas* v. *Stephens*, 128 N. Y. 123; *Heyne* v. *Blair*, 62 N. Y. 19, 23; *Fagnan* v. *Knox*, 66 N. Y. 525; *Scott* v. *Dennett Surpassing Coffee Co.*, 51 App. Div. 321.)

Therefore, compelled, as I think we are, to accept plaintiff's testimony as true, however unreasonable it might seem to us if permitted to weigh evidence, I believe it raised a question of fact as to the existence of probable cause, and that in the absence of other material errors the judgment must be affirmed.

CULLEN, Ch. J., GRAY, O'BRIEN and EDWARD T. BARTLETT, JJ., concur for reversal; WERNER and CHASE, JJ., concur with HISCOCK, J., for affirmance.

Judgment reversed, etc.

MEMORANDA

OF

DECISIONS RENDERED DURING THE PERIOD EMBRACED IN THIS VOLUME.

WILLIAM L. SHANNON, Respondent, *v.* NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY, Appellant.

Shannon v. *N. Y. & Queens El. L. & P. Co.*, 99 App. Div. 627, reversed.
(Argued January 17, 1906; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 23, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Eugene Lamb Richards, Jr., for appellant.

Melville J. France, George V. S. Williams and *William R. Wilson* for respondent.

Judgment reversed and new trial granted, costs to abide event, on the dissenting opinion of WOODWARD, J., below.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ. Not sitting: WILLARD BARTLETT, J.

THE STATE BANK OF PIKE, Respondent, *v.* GEORGE M. BROWN et al., Appellants.

State Bank of Pike v. *Brown*, 96 App. Div. 441, affirmed.
(Argued January 17, 1906; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 20, 1904, affirming a judgment in favor of plaintiff entered upon the report of a referee.

A. J. Hastings for appellants.

Greenleaf S. Van Gorder and *Elijah W. Holt* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

CORNELIUS D. CURNEN, Respondent, *v.* ROBERT B. REILLY, Appellant.

Curnen v. *Reilly*, 99 App. Div. 159, affirmed.
(Argued January 17, 1906; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 20, 1904, affirming a judgment in favor of plaintiff entered upon the report of a referee.

John C. McGuire for appellant.

Charles E. Mahony for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

WILLIAM B. RANKINE, Respondent, *v.* DE VEAUX COLLEGE FOR ORPHAN AND DESTITUTE CHILDREN et al., Appellants.

Rankine v. *De Veaux College for O. & D. Children*, 94 App. Div. 611, affirmed.
(Argued January 17, 1906; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

July 5, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

John G. Milburn for appellants.

Francis Lynde Stetson and *A. K. Potter* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

SEWARD CARY et al., Appellants, *v.* MARYLAND CASUALTY COMPANY, Respondent.

Cary v. *Maryland Casualty Co.*, 96 App. Div. 639, affirmed.
(Argued January 18, 1906; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 13, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Ansley Wilcox and *Henry A. Bull* for appellants.

Frank Gibbons for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, VANN, WERNER and WILLARD BARTLETT, JJ. Not voting: HAIGHT, J. Not sitting: HISCOCK, J.

JOSEPH WELK, Respondent, *v.* JACKSON ARCHITECTURAL IRON WORKS, Appellant, Impleaded with Another.

Welk v. *Jackson Architectural Iron Works*, 98 App. Div. 247, reversed.
(Argued January 22, 1906; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

November 18, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Frank Verner Johnson for appellant.

Charles Caldwell for respondent.

Judgment reversed and new trial granted, costs to abide event, on dissenting opinion of WOODWARD, J., below.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN and EDWARD T. BARTLETT, JJ.; WERNER, J., concurs in result on the ground that the structure in question was a scaffold, but not completed, and that plaintiff's participation in the erection thereof precluded his recovery. Dissenting: HISCOCK and CHASE, JJ.

MEYER LICHTENSTEIN, Respondent, *v.* HARRY RABOLINSKY, Appellant.

Lichtenstein v. *Rabolinsky*, 98 App. Div. 516, affirmed.
(Argued January 22, 1906; decided February 6, 1906.)

APPEAL from a judgment entered in favor of plaintiff December 29, 1904, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which reversed an order of the court at a Trial Term granting a motion for a new trial after a verdict in favor of plaintiff and directed judgment on the verdict.

Maulsby Kimball for appellant.

August Becker for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

ADRIAN H. JACKSON, Respondent, *v.* THE LAWYERS' SURETY COMPANY OF NEW YORK, Appellant.

Jackson v. *Lawyers' Surety Co.*, 95 App. Div. 368, affirmed.
(Argued January 23, 1906; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 11, 1904, reversing a judgment in favor of defendant entered upon a verdict directed by the court and directing judgment in favor of plaintiff for the relief demanded in the complaint.

Francis Smyth and *George W. Wickersham* for appellant.

Edward W. S. Johnston for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

MARY SHAPER, as Executrix of JOHN H. SHAPER, Deceased, Respondent, *v.* MARY E. C. DAVIS, Appellant.

Shaper v. *Davis*, 93 App. Div. 606, affirmed.
(Submitted January 23, 1906; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 22, 1904, modifying and affirming as modified a judgment in favor of plaintiff entered upon the report of a referee.

Ch. D. Thomas and *Adam J. Smith* for appellant.

H. A. De Coster for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

DELIA FILBERT, as Administratrix of the Estate of WILLIAM FILBERT, Deceased, Appellant, *v.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Respondent.

Filbert v. *N. Y., N. H. & H. R. R. Co.*, 95 App. Div. 199, affirmed.
(Argued January 23, 1906; decided February 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 11, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Robert H. Barnett for appellant.

Walter C. Anthony for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA, Appellant, *v.* STATE OF NEW YORK, Respondent.

Matter of Grand Trunk Ry. Co. of Canada v. *State of New York*, 97 App. Div. 634, affirmed.
(Argued January 23, 1906; decided Febuary 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 15, 1904, affirming a judgment in favor of plaintiff entered upon an award of the Court of Claims.

William L. Marcy for appellant.

Julius M. Mayer, Attorney-General (*Horace McGuire* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Not sitting: CHASE, J.

ADELE BALDWIN et al., as Administrators of the Estate of ELIZABETH B. RICE, Deceased, Appellants and Respondents, *v.* WILLIAM M. RICE, JR., et al., as Executors of WILLIAM M. RICE, Deceased, Respondents and Appellants.

(Submitted January 8, 1906; decided February 6, 1906.)

MOTION for re-argument. (See 183 N. Y. 55.)

John Brooks Leavitt, Jared F. Harrison and *Arthur B. Turnure* for motion.

James Byrne and *Charles A. Boston* opposed.

Per Curiam. In our disposition of the appeal in this case we did not misconceive the question involved, as is now contended by the learned counsel for the appellants with rather more heat than we think warranted.

We held, with the courts below, that the letters of administration were clearly ancillary in character, and that so considered they were void, as, in securing their issue, the appellants had failed to comply with the provisions of the Code of Civil Procedure. We add to the opinion already published (183 N. Y. 55) that the order directing the issue of letters contained provisions that made the letters limited and ancillary on their face. The motion for re-argument should be denied, with ten dollars costs.

CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN and WERNER, JJ., concur.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* WILLIAM E. TODD, Appellant.

People v. *Todd*, 96 App. Div. 636, appeal dismissed.
(Submitted January 29, 1906; decided February 6, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 25, 1904, which affirmed a judgment of

the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of rape in the second degree.

The motion was made on the ground that the appellant had failed to file the required return and to prosecute the appeal.

William Travers Jerome, District Attorney, for motion.

No one opposed.

Motion granted.

MENY JACOBS, as President of the PROTECTIVE COAT TAILORS' AND PRESSERS' UNION, LOCAL 55, OF THE UNITED GARMENT WORKERS OF AMERICA, Appellant, *v.* MORRIS COHEN et al., Comprising the Firm of M. COHEN & SON et al., Respondents.

(Submitted January 29, 1906; decided February 6, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 183 N. Y. 207.)

HENRY EULER, Respondent, *v.* FREDERICK KAPPELMANN, Appellant.

Euler v. *Kappelmann*, 97 App. Div. 632, affirmed.
(Argued January 18, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 10, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Clarence Edwards for appellant.

H. A. Monfort for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ. Not sitting: WILLARD BARTLETT, J.

ANDREW M. ROLLINS, Respondent, *v.* THE CO-OPERATIVE BUILDING BANK, Appellant.

Rollins v. *Co-operative Building Bank*, 98 App. Div. 606, affirmed.
(Argued January 19, 1906; decided February 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 29, 1904, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury and granting a new trial.

E. G. Bullard and *George E. Waldo* for appellant.

J. K. Long and *Thomas S. Fagan* for respondent.

Order affirmed and judgment absolute ordered against defendant on the stipulation, with costs, on opinion below.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Dissenting: HISCOCK, J.

CLAUDE L. TURNER, Respondent, *v.* DEGNON-MCLEAN CONTRACTING COMPANY, Appellant.

Turner v. *Degnon-McLean Contracting Co.*, 99 App. Div. 185, affirmed.
(Argued January 19, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 4, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Herman Aaron for appellant.

Charles Caldwell for respondent.

Judgment affirmed, with costs, on prevailing opinion below.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

MICHAEL SULLIVAN, Respondent, *v.* THE PENNSYLVANIA RAILROAD COMPANY, Appellant.

Sullivan v. *Pennsylvania R. R. Co.*, 98 App. Div. 635, affirmed.
(Argued January 19, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 7, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Allen J. Hastings for appellant.

M. B. Jewell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

MARY L. CHAMBERLAIN as Trustee of MAUD A. CUMING, Respondent, *v.* MARI A. CUMING, Appellant, Impleaded with Another.

Chamberlain v. *Cuming*, 99 App. Div. 561, affirmed.
(Argued January 24, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 22, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

Edward L. Blackman and *Alfred B. Cruikshank* for appellant.

Joseph Fischer and *Louis J. Vorhaus* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

CLAYTON C. MAUCH, Respondent, *v.* THE SUPREME TRIBE OF BEN HUR, Appellant.

Mauch v. *Supreme Tribe of Ben Hur*, 100 App. Div 49, affirmed.
(Argued January 24, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 20, 1904, affirming a judgment in favor of plaintiff entered upon the report of a referee.

P. S. Collins for appellant.

Henry Donnelly for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

WILLIAM G. CHAMBERS, Respondent, *v.* HENRY A. HOWARD, Individually and as Executor of CLARISSA ORDWAY, Deceased, Appellant.

Chambers v. *Howard*, 99 App. Div. 619, affirmed.
(Argued January 24, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 8, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

John L. Hill for appellant.

J. A. Kellogg and *H. P. King*, for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Not sitting: CHASE, J.

BURKARD GRIEBEL, Appellant, *v.* THE BROOKLYN HEIGHTS RAILROAD COMPANY, Respondent.

Griebel v. *Brooklyn Heights R. R. Co.*, 95 App. Div. 214, affirmed.
(Argued January 24, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 23, 1904, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

J. Stewart Ross for appellant.

I. R. Oeland and *George D. Yeomans* for respondent.

Judgment affirmed, with costs; no opinion.
Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

SIGMUND SAXE, Appellant, *v.* KATE T. OGDEN et al., Respondents.

Saxe v. *Ogden*, 97 App. Div. 631, affirmed.
(Argued January 24, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 2, 1904, modifying and affirming as modified a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

Milton Mayer for appellant.

Laurence L. Driggs for respondents.

Judgment affirmed, with costs; no opinion.
Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

BUFFALO CEREAL COMPANY, Respondent, *v.* CHARLES ATKINS, Appellant.

Buffalo Cereal Co v. *Atkins*, 97 App. Div. 642, modified.
(Argued January 24, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 26, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term.

Charles F. Tabor for appellant.

Frank C. Ferguson for respondent.

Judgment modified so as to be without prejudice to the appellant asserting title to the premises in dispute under any other source than the tax deed from the city of Buffalo, with costs to the respondent; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

LOUIS BOSSERT et al., Appellants, *v.* JACOB A. ZIMMERMANN et al., Respondents.

Bossert v. *Zimmermann*, 99 App. Div. 399, affirmed.
(Argued January 25, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 25, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

E. L. Blackman and *Alfred B. Cruikshank* for appellants.

John P. Everett for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

WILLIAM J. MERTZ et al., Respondents, *v.* T. CHANNON PRESS, as Receiver of the MAPES-REEVE CONSTRUCTION COMPANY, et al., Appellants.

Mertz v. *Press*, 99 App. Div. 443, affirmed.
(Argued January 25, 1905; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 17, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court and an order denying a motion for a new trial.

Frederic J. Swift for appellants.

Ernest Hall for respondents.

Judgment affirmed, with costs; no opinion.
Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

FRANK J. WADDELL, as Administrator of the Estate of WILLIAM A. WADDELL, Deceased, Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Waddell v. *N. Y. C. & H. R. R. R. Co.*, 98 App. Div. 343, reversed.
(Argued January 26, 1906; decided February 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 28, 1904, which reversed an order made at a Trial Term denying a motion for a new trial after a verdict in favor of plaintiff and granted a new trial.

George H. Harris for appellant.

Daniel M. Beach for respondent.

Order of Appellate Division reversed and judgment of Trial Term affirmed, with costs in both courts, on the ground that under the circumstances the contributory negligence of the plaintiff was a question of fact for the jury; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: GRAY and HISCOCK, JJ.

LAWRENCE BROTHERS, INCORPORATED, Respondent, *v.* HENRY B. HEYLMAN, Appellant.

Lawrence Brothers v. *Heylman*, 89 App. Div. 620, affirmed.
(Argued January 26, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 13, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Thaddeus D. Kenneson and *Henry B. Heylman*, in person, for appellant.

Ralph Earl Prime, Jr., and *A. J. Prime* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

FRANK ERN, Respondent, *v.* THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

Ern v. *Brooklyn Heights R. R. Co.*, 101 App. Div. 609, affirmed.
(Submitted January 26, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 12, 1905, affirming a judgment in favor of plaintiff

entered upon a verdict and an order denying a motion for a new trial.

I. R. Oeland and *George D. Yeomans* for appellant.

Alfred J. Gilchrist and *Carl J. Heyser* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

KATE DEVEREAUX, Respondent, *v.* METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

Devereaux v. *Metropolitan Life Ins. Co.*, 94 App. Div. 613, affirmed.
(Argued January 29, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 24, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Eugene Van Voorhis for appellant.

James M. E. O'Grady for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

THE NORTHERN ELEVATOR COMPANY, LIMITED, Appellant, *v.* THE LEHIGH VALLEY RAILROAD COMPANY, Respondent.

Northern Elevator Co., Limited, v. *Lehigh Valley R. R. Co.*, 98 App. Div. 635, affirmed.
(Argued January 29, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 8, 1904, affirming a judgment in favor of defendant

entered upon a verdict directed by the court and an order denying a motion for a new trial.

J. H. Metcalf for appellant.

James McCormick Mitchell and *Martin Carey* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

JAMES W. PURDY, JR., et al., Respondents, *v.* GUY S. BRANTINGHAM, Appellant, Impleaded with Another.

Purdy v. *Brantingham*, 100 App. Div. 516, affirmed.
(Argued January 29, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 30, 1905, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Alexander Thain for appellant.

Allan C. Rowe for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, WERNER, HISCOCK and CHASE, JJ. Not voting: EDWARD T. BARTLETT, J.

APOLLONIA WARTH, Doing Business under the Name of ALBIN WARTH, Appellant, *v.* KUH, NATHAN & FISCHER COMPANY, INCORPORATED, Respondent.

Warth v. *Kuh, Nathan & Fischer Co.*, 99 App. Div. 623, affirmed.
(Argued January 29, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April

27, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

J. Newton Fiero for appellant.

Lawrence E. Sexton for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

FRANK E. PATE, Respondent, *v.* SAYRE MOULDING COMPANY, LIMITED, Appellant.

Pate v. *Sayre Moulding Co.*, 101 App. Div. 608, affirmed.
(Argued January 29, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 24, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Julian G. Roberts and *Albert G. Milbank* for appellant.

Augustus J. Koehler for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

ANNA M. SMITH, Respondent, *v.* RICHARD R. HULL, Appellant.

Smith v. *Hull*, 97 App. Div. 228, affirmed.
(Submitted January 30, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 20, 1904, in favor of plaintiff, upon the submis-

sion of a controversy under section 1279 of the Code of Civil Procedure.

William F. Timm for appellant.

Franklin Couch for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

SILAS B. MOORE, Respondent, *v.* STEPHEN HOYT et al., Appellants.

Moore v. *Hoyt*, 95 App. Div. 620, affirmed.
(Argued January 30, 1906; decided February 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 24, 1904, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Richard L. Hand and *Robert Dornburgh* for appellants.

J. Sanford Potter for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Not voting: CULLEN, Ch. J. Not sitting: CHASE, J.

AMELIA R. LOWTHER et al., Respondents, *v.* SAMUEL V. ABEL et al., Defendants, and SYLVAN L. COOK, Appellant.

Lowther v. *Cook*, 108 App. Div. 365, appeal dismissed.
(Submitted February 5, 1906; decided February 13, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 8, 1905, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the decision of the Appellate Division was unanimous, and that, therefore, no question is presented that the Court of Appeals has jurisdiction to review.

W. H. Van Benschoten for motion.

Franklin Bien opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

FLORENCE O. DENNIS-WICKERS, Respondent, *v.* THE VILLAGE OF ELMIRA HEIGHTS, Appellant.

(Submitted February 5, 1906; decided February 13, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 182 N. Y. 534.)

JAMES C. LIVINGSTON et al., Respondents, *v.* DEWITT STAFFORD, as Commissioner of Highways of the Town of Stratford, et al., Appellants.

Livingston v. *Stafford*, 99 App. Div. 108, affirmed.
(Argued January 30, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 17, 1904, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury.

Frederick Collin for appellants.

Andrew J. Nellis and *Robert F. Livingston* for respondents.

Judgment affirmed, with costs, on the opinions of the Trial Term and Appellate Divison below.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Dissenting: O'BRIEN, J. Not sitting: CHASE, J.

EDWARD L. RIKER et al., Appellants, *v.* THE PRESIDENT AND DIRECTORS OF THE FIRE INSURANCE COMPANY OF NORTH AMERICA, Respondent.

Riker v. *President, etc., Fire Ins. Co. No. America*, 90 App. Div. 391, affirmed.

(Argued January 31, 1906; decided February 16, 1906.)

APPEAL from a judgment entered January 18, 1904, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, overruling plaintiffs' exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for the defendant.

Frederick W. Smith for appellants.

Horace McGuire for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Dissenting: CULLEN, Ch. J. Not sitting: HISCOCK, J.

JAMES A. BLANCHARD, Respondent, *v.* VINCENZO SAVARESE et al., Appellants.

Blanchard v. *Savarese*, 97 App. Div. 58, affirmed.

(Argued January 31, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 3, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Albert M. Yuzzolino and *Lorenzo Ullo* for appellants.

Isaac N. Mills for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

RAY T. TOOMEY, Respondent, *v.* GEORGE H. GRAF et al., Appellants.

Toomey v. *Graf*, 100 App. Div. 512, affirmed.
(Argued January 31, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 1, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Robert Cooper for appellants.

Delmar M. Darrin for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

LUCIEN A. BLANDING et al., Respondents, *v.* ISAAC M. COHEN, Appellant.

Blanding v. *Cohen*, 101 App. Div. 442, affirmed.
(Argued February 1, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 18, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

Charles L. Hoffman and *Henry A. Friedman* for appellant.

Edward P. Lyon for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

AARON M. JANPOLE et al., Respondents, *v.* MORRIS L. LASKY, Appellant.

Janpole v. *Lasky*, 94 App. Div. 853, affirmed.
(Submitted February 1, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 6, 1905, in favor of plaintiffs upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

Samuel D. Lasky for appellant.

Moses Esberg for respondents.

Judgment affirmed, with costs, on opinion below.
Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

AMELIA SEIZER, Respondent, *v.* THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

Seizer v. *Brooklyn Heights R. R. Co.*, 101 App. Div. 609, affirmed.
(Submitted February 1, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 6, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

George D. Yeomans and *I. R. Oeland* for appellant.

Edward A. Alexander and *Jerome H. Buck* for respondent.

Judgment affirmed, with costs; no opinion.
Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

CHARLES P. SEIZER, Respondent, *v.* THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

Seizer v. *Brooklyn Heights R. R. Co.*, 101 App. Div. 609, affirmed.
(Submitted February 1, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 6, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

George D. Yeomans and *I. R. Oeland* for appellant.

Edward A. Alexander and *Jerome H. Buck* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

OLIVE HANCOCK, Respondent, *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Hancock v. *N. Y. C. & H. R. R. R. Co.*, 100 App. Div. 161, affirmed.
(Argued February 1, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 24, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Daniel M. Beach for appellant.

E. A. Griffith for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: GRAY and HISCOCK, JJ.

WILLIAM K. MOTT, Respondent, *v.* ELEAZER W. EDWARDS et al., Appellants.

Mott v. *Edwards*, 98 App. Div. 511, affirmed.
(Argued February 1, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 28, 1904, which affirmed a judgment of the Onondaga County Court affirming a judgment of the Municipal Court of the city of Syracuse in favor of plaintiff.

E. W. Cregg for appellants.

C. W. Darling for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

F. HOWARD HOOKE, Respondent and Appellant, *v.* THE FINANCIER COMPANY, Appellant and Respondent.

Hooker v. *Financier Co.*, 99 App. Div. 186, reversed.
(Argued February 2, 1906; decided February 16, 1906.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 19, 1904, modifying and affirming as modified a judgment in favor of plaintiff entered upon the report of a referee.

John J. O'Connell for plaintiff, respondent and appellant.

Theron G. Strong for defendant, appellant and respondent.

Per Curiam. The stipulation of the parties was plainly intended to eliminate from the appeal all questions relating to the amount of the judgment. We find that the contracts of employment were valid and binding obligations of the defend-

ant, and that that part of the judgment appealed from by the plaintiff, appellant, should be reversed and the judgment as entered upon the report of the referee should be affirmed, with costs to the plaintiff in the Appellate Division and in this court.

CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ., concur.

Judgment accordingly.

GRANT C. FOX, Respondent, *v.* WILLIAM ERBE et al., Appellants, Impleaded with Another.

Fox v. *Erbe*, 100 App. Div. 343, affirmed.
(Argued February 2, 1906; decided February 16, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 18, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

James P. Niemann for appellants.

Grant C. Fox for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

ROBERT D. VROOM, Respondent, *v.* RUSSELL SAGE, Appellant.

Vroom v. *Sage*, 100 App. Div. 285, affirmed.
(Argued February 1, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 16, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

George W. Wickersham, Sidney Smith and *Charles A. Gardiner* for appellant.

Henry D. Hotchkiss for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

DAVID MURPHY, Respondent, *v.* THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellant.

Murphy v. *U. S. Fidelity & Guaranty Co.*, 100 App. Div. 93, affirmed.
(Argued February 2, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 12, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Thomas Hogan for appellant.

William F. Hodge for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

RICHARD WILLIAMSON, Respondent, *v.* S. WRIGHT MCCOLLUM, Appellant.

Williamson v. *McCollum*, 96 App. Div. 638, affirmed.
(Argued February 5, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 26, 1904, affirming a judgment in favor of plaintiff

entered upon a decision of the court on trial at an Equity Term.

P. F. King for appellant.

A. K. Potter for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

LAWRENCE SHEARY et al., Respondents, *v.* JOHN O'BRIEN et al., Appellants.

Sheary v. *O'Brien*, 75 App. Div. 121, affirmed.
(Submitted February 5, 1903; decided February 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 8, 1902, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial.

John W. Browne for appellants.

H. D. Bailey for respondents.

Order affirmed and judgment absolute ordered against defendants, on the stipulation with costs in all courts, on opinion below.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Not sitting: GRAY and CHASE, JJ.

THE DEGNON-MCLEAN CONSTRUCTION COMPANY, Respondent, *v.* THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, Appellant.

Degnon-McLean Constr. Co. v. *City Trust, S. D. & S. Co.*, 99 App. Div. 195, affirmed.
(Argued February 5, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

December 17, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Frederic J. Swift for appellant.

Herman Aaron for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

FERDINAND A. STRAUS, Respondent, *v.* ALBERT BUCHMAN et al., Appellants.

Straus v. *Buchman*, 96 App. Div. 270, affirmed.
(Argued February 5, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 30, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Samson Lachman and *Theodore Baumeister* for appellants.

Charles Strauss for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

PIETRO GANGUZZA, Appellant, *v.* ANCHOR LINE (HENDERSON BROTHERS, LIMITED), Respondent.

Ganguzza v. *Anchor Line*, 97 App. Div. 352, affirmed.
(Argued February 5, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 22, 1904, affirming a judgment in favor of defendant

entered upon a verdict and an order denying a motion for a new trial.

Louis O. Van Doren for appellant.

Everett Masten for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

ARTHUR SCHWARZENBACH, Respondent, *v.* THE ELECTRIC WATER POWER COMPANY OF ONEONTA, Appellant.

Schwarzenbach v. *Electric Water Power Co. of Oneonta*, 101 App. Div. 845, affirmed.

(Argued February 6, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 10, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

A. R. Gibbs for appellant.

Alva Seybolt for respondent.

Judgment affirmed, with costs; no opinion.

Concur: EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Dissenting: CULLEN, Ch. J., and GRAY, J. Not sitting: CHASE, J.

JOHN J. KIRKPATRICK, Appellant, *v.* ALLEMANNIA FIRE INSURANCE COMPANY, Respondent.

Kirkpatrick v. *Allemannia Fire Ins. Co.*, 102 App. Div. 327, affirmed.

(Argued February 6, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 10, 1905, affirming a judgment in favor of defendant

entered upon a verdict and an order denying a motion for a new trial.

William B. Ellison and *Arnold L. Davis* for appellant.

Edgar J. Nathan and *Michael H. Cardozo* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

MAURICE PERELES, Appellant, *v.* THE ROCHESTER GERMAN INSURANCE COMPANY OF ROCHESTER, N. Y. Respondent.

Pereles v. *Rochester German Ins. Co.*, 94 App. Div. 614, affirmed.
(Argued February 7, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 28, 1904, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

Vernon Cole and *Moses Shire* for appellant.

Joseph W. Taylor for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

EMMA R. L. SEILLIERE, Respondent, *v.* LEON O. BAILEY et al., Defendants, and JOHN PEIRCE et al., Appellants.

Seilliere v. *Bailey*, 102 App. Div. 614, affirmed.
(Submitted February 7, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March

3, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

James D. Fessenden for appellants.

Stephen O. Lockwood for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

CARLOS P. TUCKER, Respondent, *v.* THE EDISON ELECTRIC ILLUMINATING COMPANY OF NEW YORK, Appellant.

Tucker v. *Edison Electric Ill. Co.*, 100 App. Div. 407, affirmed.
(Argued February 7, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 14, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Henry J. Hemmens and *Samuel A. Beardsley* for appellant.

George J. McEwan and *Frank M. Hardenbrook* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

SIMEON M. BARBER, Respondent, *v.* ABEDNEGO DEWES, Appellant.

Barber v. *Dewes*, 101 App. Div. 482, affirmed.
(Argued February 8, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 23, 1905, affirming a judgment in favor of plaintiff

entered upon a verdict and an order denying a motion for a new trial.

Nelson Zabriskie for appellant.

Frank G. Wild for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

FRANK T. HAWLEY, as Grand Master of the SWITCHMEN'S UNION OF NORTH AMERICA, Respondent, *v.* THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellant.

Hawley v. *U. S. Fidelity & Guaranty Co.*, 100 App. Div. 12, affirmed. (Argued February 8, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 21, 1904, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial.

George P. Keating for appellant.

Henry W. Killeen and *V. H. Riordan* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J. GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

RALPH C. FARNSWORTH, Appellant, *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Farnsworth v. *N. Y. C. & H. R. R. R. Co.*, 102 App. Div. 621, affirmed. (Argued February 9, 1906; decided February 27, 1906.)

APPEAL from a judgment, entered March 16, 1905, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which affirmed a final judgment

in favor of defendant, entered upon a former reversal by the Appellate Division of an interlocutory judgment of Special Term sustaining a demurrer to the complaint.

Ernest B. Millard for appellant.

H. E. Rourke for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Not sitting: GRAY, J.

FRANK MCWILLIAMS, Respondent, *v.* YELLOW PINE COMPANY, Appellant.

McWilliams v. *Yellow Pine Co.*, 102 App. Div. 624, affirmed.
(Argued February 9, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 9, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Eustace Conway for appellant.

William M. Mullen and *James J. Macklin* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

JOHN MURPHY, Respondent, *v.* EDWARD CUFF, Appellant.

Murphy v. *Cuff*, 100 App. Div. 513, affirmed.
(Argued February 9, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 30, 1905, affirming a judgment in favor of plaintiff

entered upon a verdict and an order denying a motion for a new trial.

John N. Carlisle for appellant.

F. B. Pitcher and *George A. Lawyer* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

THOMAS L. REYNOLDS, Respondent, *v.* RUTH BRITTON, as Executrix of DENNIS MCMAHON et al., Defendants, and LUCY BOWEN, Appellant.

Reynolds v. *Britton*, 102 App. Div. 609, affirmed.
(Argued February 12, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 11, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Robert J. Mahon for appellant.

Claude V. Pallister and *Francis C. Reed* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

CHARLES W. METCALF, an Infant, by SARAH M. BARBER, His Guardian ad Litem, Respondent, *v.* JONATHAN W. METCALF, Appellant.

Metcalf v. *Metcalf*, 97 App. Div. 641, affirmed.
(Argued February 12, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

October 18, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

H. L. Munson and *A. B. Ottaway* for appellant.

Charles H. Addington for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

JAMES BRADLEY, Respondent, *v.* PETER WAGNER et al., Appellants.

Bradley v. *Wagner*, 90 App. Div. 607, affirmed.
(Submitted February 12, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 3, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

John P. Everett for appellants.

Henry Wendt and *Edward D. Edson* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

CHARLES M. COHNFELD, Respondent, *v.* LEON TANENBAUM, Appellant.

Cohnfeld v. *Tanenbaum*, 102 App. Div. 614, affirmed.
(Argued February 12, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

March 6, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Benjamin N. Cardozo and *Sol. M. Stroock* for appellant.

George W. Weiffenbach for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* EDWARD R. THOMAS, Appellant.

People v. *Thomas*, 110 App. Div. 889, affirmed.
(Argued February 13, 1906; decided February 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 13, 1905, which affirmed a judgment of the Court of Special Sessions in the city of New York convicting the defendant of a misdemeanor in operating an automobile at an unlawful rate of speed.

P. J. Rooney and *Alfred Lauterbach* for appellant.

William Travers Jerome, District Attorney (*Robert C. Taylor* of counsel), for respondent.

Judgment of conviction affirmed; no opinion

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

ELIZABETH RING, Respondent, *v.* EUGENE B. HOWELL, as Receiver of the LONG ISLAND REAL ESTATE, EXCHANGE AND INVESTMENT COMPANY, Appellant.

Ring v. *Long Island Real Estate, Exchange & Inv. Co.*, 98 App. Div. 442, affirmed.
(Argued February 13, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

May 19, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the Kings County Court on trial without a jury.

Robert H. Wilson for appellant.

James C. Cropsey and *Frank Mann* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Absent: CULLEN, Ch. J. Not sitting: WILLARD BARTLETT, J.

JAMES G. BYARS, Appellant, *v.* BENNINGTON AND HOOSICK VALLEY RAILWAY COMPANY, Respondent.

Byars v. *Bennington & H. V. Ry. Co.*, 99 App. Div. 34, affirmed.
(Argued February 13, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 10, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

J. K. Long and *Thomas S. Fagan* for appellant.

P. R. Chapman and *George E. Greene* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Absent: CULLEN, Ch. J. Not sitting: CHASE, J.

THE GERMANIA LIFE INSURANCE COMPANY, Appellant, *v.* JOHN CASEY, Respondent, Impleaded with Others.

SAME *v.* SAME.

Germania L. Ins. Co. v. *Casey*, 98 App. Div. 88, affirmed; *Germania L. Ins. Co.* v. *Casey*, 98 App. Div. 619, affirmed.
(Argued February 13, 1906; decided February 27, 1906.)

APPEAL in each of the above-entitled actions from a judgment of the Appellate Division of the Supreme Court in the

first judicial department, entered December 2, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

Henry B. Pogson for appellant.

Benjamin N. Cardozo and *Jacob Steinhardt* for respondent.

Judgment in each action affirmed, with costs, upon the ground that the second conclusion of law by the trial court is in part a finding of fact as to an agreement between the plaintiff and the owner of the property for an extension of the time for the payment of the principal sum secured by the mortgage; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, VANN and WILLARD BARTLETT, JJ. Dissenting: HAIGHT and CHASE, JJ. Absent: CULLEN, Ch. J.

BRODIE L. DUKE, Appellant, *v.* DANIEL O'DELL et al., Respondents.

Duke v. *O'Dell*, 100 App. Div. 517, affirmed.
(Argued February 13, 1906; decided February 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 1, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

William F. Goldbeck for appellant.

Richard Reid Rogers and *Paul D. Cravath* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

THE GENEVA MINERAL SPRINGS COMPANY, Appellant, *v.* CHARLES A. STEELE, Respondent, Impleaded with Others.

Geneva Mineral Springs Co. v. *Steele*, 102 App. Div. 620, appeal dismissed.

(Argued February 26, 1906; decided February 27, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of Supreme Court in the fourth judicial department, entered March 11, 1905, which affirmed an order of Special Term denying plaintiff's motion to set aside the report of a referee and for a new trial.

The motion was made upon the grounds that the order appealed from was an intermediate one and so not appealable as of right to the Court of Appeals, and that permission to appeal had not been granted.

William S. Moore for motion.

John Gillette opposed.

Motion granted and appeal dismissed, with costs, and ten dollars costs of motion.

JOSEPH FINN, Respondent, *v.* THE IRONCLAD MANUFACTURING COMPANY, Appellant.

Finn v. *Ironclad Mfg. Co.*, 99 App. Div. 625, affirmed.

(Argued February 14, 1906; decided March 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 6, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

John J. Kuhn and *William N. Dykman* for appellant.

James C. Cropsey and *F. W. Catlin* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Absent: CULLEN, Ch. J. Not sitting: WILLARD BARTLETT, J.

L. D. GARRETT COMPANY, Appellant, *v.* DANIEL SIDNEY APPLETON, Respondent.

Garrett Co. v. *Appleton*, 101 App. Div. 507, affirmed.
(Argued February 15, 1906; decided March 6, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 24, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

Edgar J. Nathan and *Michael H. Cardozo* for appellant.

Charles E. Lydecker for respondent.

Order affirmed and judgment absolute ordered against the plaintiff on the stipulation, with costs in all the courts, on opinion below.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

L. D. GARRETT COMPANY, Appellant, *v.* WILLIAM A. CLARK, Respondent.

Garrett Co. v. *Clark*, 102 App. Div. 611, affirmed.
(Argued February 15, 1906; decided March 6, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 24, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

Edgar J. Nathan and *Michael H. Cardozo* for appellant.

Alfred B. Cruikshank for respondent.

Order affirmed and judgment absolute ordered against the plaintiff on the stipulation, with costs in all the courts, on opinion below.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

In the Matter of the Accounting of WILLIAM J. RILEY, as Administrator of the Estate of JOHN MARTIN, Deceased.

WILLIAM J. RILEY, Individually and as Administrator, et al., Appellants; DENNIS GREELEY et al., Respondents.

(Submitted February 26, 1906; decided March 6, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 183 N. Y. 576.)

GEORGE W. COE, Respondent, *v.* MARY PATTERSON et al., as Administrators of the Estate of THOMAS G. PATTERSON, Deceased, Appellants, Impleaded with Another.

Coe v. *Patterson*, 108 App. Div. 360, appeal dismissed.
(Submitted February 26, 1906; decided March 6, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 9, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the judgment appealed from does not finally determine the action and that no appeal has been allowed therefrom.

John Van Voorhis & Sons for motion.

Pierre M. Brown opposed.

Motion granted and appeal dismissed, without costs, and case remitted to the Appellate Division as undecided for its determination of the appeal from a final judgment at Special Term.

BERNARD MCGOVERN, Respondent, *v.* MANHATTAN RAILWAY COMPANY, Appellant.

McGovern v. *Manhattan Ry. Co.*, 110 App. Div. 889, appeal dismissed.
(Argued February 26, 1906; decided March 6, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial depart-

ment, entered January 12, 1906, which affirmed an order of the court at a Trial Term denying a motion for a new trial.

The motion was made upon the ground that the order was not appealable as of right to the Court of Appeals and permission to appeal had not been granted.

Augustus Van Wyck for motion.

Austen G. Fox and *Charles A. Gardiner* opposed.

Motion granted and appeal dismissed, with costs, and ten dollars costs of motion.

JOHANNA GADSKI-TAUSCHER, Respondent, *v.* CLARENCE L. GRAFF, Appellant.

Gadski-Tauscher v. *Graff*, 105 App. Div. 640, appeal dismissed.
(Argued February 26, 1906; decided March 6, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 17, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the action was for services, the judgment of affirmance by the Appellate Division unanimous, and, therefore, not appealable to the Court of Appeals, except by permission, which had not been granted.

Henry N. Wessel for motion.

Walter M. Rosebault opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion, on the ground that the complaint is clearly one to recover for services rendered, and the character of the action is determined by the complaint within the meaning of section 191 of the Code of Civil Procedure.

THE NATIONAL CONTRACTING COMPANY, Respondent, *v.* HUDSON RIVER WATER POWER COMPANY, Appellant.

(Argued February 26, 1906; decided March 6, 1906.)

MOTION to amend remittitur. (See 170 N. Y. 439.)

Motion granted so far as to give the plaintiff the right to apply at Special Term for the withdrawal of the demurrer to the third defense set up in the answer upon such terms and conditions as the Supreme Court may impose.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ISIDORE GREENBERG, Appellant, *v.* THE WARDEN OF THE CITY PRISON OF THE CITY OF NEW YORK et al., Respondents.

People ex rel. Greenberg v. *Warden, etc., City Prison*, 88 App. Div. 456, appeal dismissed.

(Submitted February 26, 1906; decided March 6, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 4, 1903, which affirmed an order of Special Term dismissing writs of habeas corpus and certiorari in behalf of relator.

The motion was made upon the ground that no steps had been taken by the appellant to prosecute and bring on for argument the appeal since the service of the notice thereof.

William Travers Jerome, *District Attorney* (*Robert S. Johnston* of counsel), for motion.

No one opposed.

Motion granted and appeal dismissed.

MARY CRAPO, as Administratrix of the Estate of HENRY CRAPO, Deceased, Appellant, *v.* THE CITY OF SYRACUSE, Respondent.

(Submitted February 26, 1906; decided March 6, 1906.)

MOTION for re-argument. (See 183 N. Y. 395.)

Walter W. Magee for motion.

Thomas Hogan opposed.

O'BRIEN, J. The only ground upon which the respondent moves for a re-argument, so far as I can learn from the moving papers, is that the court failed to pass upon the question of negligence.

I think the learned corporation counsel is mistaken in that contention. It will be seen from the report of the case (183 N. Y. 395) that one of the opinions deals fully with the question as to whether there was proof of negligence on the part of the plaintiff sufficient to submit to the jury, and it was held there was. Three other judges concurred in the reversal of the Appellate Division and affirmance of the trial court. This was necessarily a vote on their part that the question of negligence was for the jury. The majority of the court differed among themselves on one point only, and that was whether the action was for a personal injury. That question was immaterial so long as it was held that the cause of action did not accrue till the appointment of the administratrix. The motion for a re-argument should be denied, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and WERNER, JJ., concur.

Motion denied.

JOHN CHARLES MILLER, Respondent, *v.* SENECA RIVER POWER COMPANY, Appellant.

Miller v. *Seneca River Power Co.*, 102 App. Div. 619, affirmed.
(Argued February 14, 1906; decided March 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 7, 1905, modifying and affirming as modified a judgment in favor of plaintiff entered upon the report of a referee.

Jerome L. Cheney and *John B. Tuck* for appellant.

E. M. White for respondent.

Judgment affirmed, with costs; no opinion.
Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

MARTIN POWELL, Appellant, *v.* EVERETT HARRISON et al., Defendants.

CHEMUNG CANAL BANK, Respondent.

Powell v. *Harrison*, 101 App. Div. 612, affirmed.
(Argued February 26, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 12, 1905, which affirmed an order of Special Term in surplus money proceedings.

James M. Sullivan and *J. John Hassett* for appellant.

Frederick Collin for respondent.

Order affirmed, with costs; no opinion.
Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Accounting of JOHN F. HALSTED, as Surviving Trustee under the Will of CHARLES J. BUCKINGHAM, Deceased, Respondent.

MARTHA W. B. WOOD et al., Appellants.

Matter of Halsted, 110 App. Div. 909, affirmed.
(Argued February 26, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 8, 1905, which affirmed a decree of the Dutchess County Surrogate's Court settling the accounts of the trustee herein.

George H. Yeaman, *George C. Kobbé* and *Charles F. Cossum* for appellants.

Alton B. Parker, *Frank B. Lown* and *Allison Butts* for respondent.

Order affirmed, with costs; no opinion.

Concur: HAIGHT, VANN, WERNER and HISCOCK, JJ. Dissenting: CULLEN, Ch. J., and O'BRIEN, J. Not sitting: WILLARD BARTLETT, J

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ERIE RAILROAD COMPANY, Appellant, *v.* THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NEW YORK et al., Respondents.

People ex rel. Erie R. R. Co. v. *Board R. R. Comrs.*, 101 App. Div. 251, affirmed.
(Argued February 27, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 19, 1905, which confirmed a determination of the board of railroad commissioners granting to the Bingham-

ton and Southern Railroad Company a certificate of public convenience and necessity pursuant to the provisions of section 59 of the Railroad Law.

W. D. Painter for appellant.

Eliot Norton, *Alton B. Parker* and *Theodore R. Tuthill* for respondent Binghamton and Southern Railroad Company.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of S. WILLIAM BRISCOE, Appellant, *v.* WILLIAM F. BAKER et al., Constituting the CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, Respondents.

Matter of Briscoe v. *Baker*, 107 App. Div. 616, affirmed.
(Argued February 27, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 13, 1905, which affirmed an order of Special Term which denied the petitioner's motion for an order directing the defendant civil service commission to permit an inspection of certain papers under their control.

John W. Weed for appellant.

John J. Delany, *Corporation Counsel* (*Theodore Connoly* and *William B. Crowell* of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Application of the UTICA AND MOHAWK VALLEY RAILWAY COMPANY, Appellant, *v.* FRANK SPOHN et al., Respondents.

Mattter of Utica & M. V. Ry. Co. v. *Spohn*, 105 App. Div. 627, affirmed.
(Submitted February 27, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 26, 1905, which affirmed an order of Special Term confirming the report of commissioners of appraisal in condemnation proceedings.

William Kernan and *Charles D. Thomas* for appellant.

P. C. J. De Angelis and *William J. Gardinier* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ANDREW BROWN, Appellant, *v.* FRANCIS V. GREENE, as Commissioner of Police of the City of New York, Respondent.

People ex rel. Brown v. *Greene*, 106 App. Div. 230, affirmed.
(Argued February 27, 1903; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 8, 1905, which confirmed the determination of the defendant in dismissing the relator from the police force of the city of New York.

J. Newton Fiero, *Louis J. Hamel* and *Samuel J. Rawak* for appellant.

John J. Delany, *Corporation Counsel* (*James D. Bell* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ. Not sitting: WILLARD BARTLETT, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. STEPHEN J. REAGAN, Appellant, *v.* JOHN N. PARTRIDGE, as Police Commissioner of the City of New York, Respondent.

People ex rel. Reagan v. *Partridge*, 103 App. Div. 609, modified.
(Argued February 28, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 12, 1905, which dismissed a writ of certiorari and affirmed the proceedings of the defendant in dismissing the relator from the police force of the city of New York.

Abram I. Elkus, *Carlisle J. Gleason* and *Percival G. Barnard* for appellant.

John J. Delany, *Corporation Counsel* (*Theodore Connoly*, *Terence Farley* and *Thomas F. Noonan* of counsel), for respondent.

HAIGHT, J. The relator was charged with: (1) Conduct unbecoming an officer;

(2) Conduct injurious to the public peace;

(3) Neglect and disobedience of orders under the rules of the police department, particularly numbering the rules claimed to have been disobeyed;

(4) Neglect of duty;

(5) Asking and receiving bribes upon the agreement that his action as an officer should be influenced thereby contrary to section 72 of the Penal Code;

(6) Perjury committed in the Supreme Court, criminal term, in the case of *People* against *John D. Herlihy*. There were specifications accompanying these charges. The trial took place before one of the deputy commissioners, who, after taking the evidence presented on behalf of the prosecution, held that the evidence was insufficient to warrant a conviction on four of the charges specified and the trial thereupon proceeded upon the other two charges. At the conclusion of the evidence the deputy commissioner made the following report to the commissioner, accompanied by the evidence taken by

him: "After mature deliberation I find patrolman Stephen J. Reagan of the twenty-fifth precinct guilty of neglect of duty, in that he failed to repress or restrain the unlawful and disorderly houses within the twelfth precinct, to which precinct he was attached as precinct detective, between September 24th, 1899, and November 26th, 1900, and did not arrest the persons guilty of violating the laws or ordinances for the suppression and punishment of crimes and offenses in certain places charged in the complaint.

"I further find patrolman Stephen J. Reagan of the twenty-fifth precinct guilty of disobedience of rule 47, paragraph H of the Rules and Regulations of the police department.

"I recommend that the said patrolman Stephen J. Reagan of the twenty-fifth precinct be dismissed from the police force of the city of New York."

This report was signed by the deputy commissioner, N. B. Thurston, and underneath is indorsed the following: "Approved, August 22, 1902, John N. Partridge, Commissioner." Upon this report and the approval of the commissioner there was entered that which we will denominate the final order in the proceeding, under the same date, in which there is a recital of the proceedings, all of the charges, numbering them from one to six inclusive, the trial before the deputy commissioner, and the reference thereof to the police commissioner for his decision; and then concludes "Upon due consideration the police commissioner does adjudge the said Patrolman Stephen J. Reagan to be guilty of the charge and does convict him thereof and upon such conviction adjudges and determines that the said Patrolman Stephen J. Reagan be dismissed from the police force of the police department of the City of New York. By order of the commissioner." (Signed) "William H. Kipp, chief clerk."

It will be observed that the final order, in form, convicts the relator upon all of the charges upon which he was tried, whereas, in fact, four of the charges were dismissed during the trial by the deputy commissioner after the close of the evidence on behalf of the prosecution, and the trial then proceeded only upon the two remaining charges. Upon the conclusion of the evidence the deputy commissioner made his

report to the commissioner, finding the relator guilty upon those two charges, and thereupon recommended his removal.

The commissioner of police indorsed upon this report his approval, thereby confirming the conviction upon those two charges and the recommendation of the deputy for his removal. The final order appears to have been entered and signed by a clerk and not by the commissioner. It does not conform to the finding and recommendation of the deputy commissioner, which was approved and confirmed by the commissioner. It is, therefore, apparent that the commissioner's judgment in imposing the punishment of dismissal from the force was based solely upon the two charges upon which he was found guilty, and the only error appearing in the case is that the clerk in entering the final order did not conform the same to the findings which were approved by the commissioner. The Appellate Division has unanimously affirmed, and we conclude that the only modification required is that the final order, as entered, be made to conform to the findings approved by the commissioner, by striking out therefrom the four charges which had been dismissed during the trial. Inasmuch as this relief could have been obtained upon an application to the commissioner, upon calling his attention to the error of the clerk in entering the order, we think that no costs of this appeal should be allowed to either party.

The order of the Appellate Division should be modified in the particulars mentioned, and as modified affirmed, without costs to either party.

CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur; O'BRIEN, J., not voting.

Ordered accordingly.

In the Matter of the Application of FRANK L. FROMENT et al., Appellants, to Establish a Lien on a Vessel in the Custody of WILLIAM J. BURLEE, Trustee in Bankruptcy, Respondent.

Matter of Froment, 110 App. Div. 72, modified.
(Argued March 1, 1906; decided March 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

December 29, 1905, which reversed an order of Special Term confirming the report of a referee in a proceeding to establish a lien upon a vessel under section 3419 *et seq.* of the Code of Civil Procedure and dismissed the proceeding.

Robert J. Mahon for appellants.

Clarence P. Moser and *David Bennett King* for respondent.

WERNER, J. The learned Appellate Division not only reversed the order made at Special Term, but dismissed the petitioner's proceedings instead of granting a new trial. This, we think, was error, which requires a modification of the order appealed from to the extent of directing that a new trial be had. The learned court below obviously based its decision upon the findings of the referee, to the effect that all but two of the twenty items of materials comprehended within the claim upon which the petitioners assert their right to a lien were barred by the period of limitation fixed by the statute, and that the two items referred to, which were delivered within the statutory period, consisted of materials which were not used in the construction of the vessel against which the petitioners claim their lien. We do not now decide whether the Appellate Division properly construed the statute under which the petitioners claim their lien, for the case depends, in part at least, upon oral evidence which may be changed, and that consideration alone demands the granting of a new trial. (*Dixon* v. *James*, 181 N. Y. 129.) Neither do we decide whether the petitioners' claim is based upon a single and entire contract for the delivery of materials at successive periods, as to which the time for acquiring a statutory lien may be computed from the date of the last delivery of materials, or whether each delivery was made under a separate contract, under each of which it was necessary to file a distinct claim for a lien in order to escape the time limitation prescribed by the statute. These questions and others that might be suggested may or may not arise upon another trial, and they cannot properly be decided now.

The order of the Appellate Division should be modified so as to grant a new trial, with costs to abide the event, and as so modified affirmed, without costs of this appeal to either party.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN and HISCOCK, JJ., concur; WILLARD BARTLETT, J., not sitting.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* HERMAN BARTELS, Appellant.

People v. *Bartels*, 110 App. Div. 922, appeal dismissed.
(Argued February 26, 1906; decided March 13, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 6, 1905, which affirmed an order of Special Term denying a motion for a change of venue.

The motion was made upon the ground that the appeal was unauthorized.

Robert J. Burritt for motion.

William A. Cowie opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

WILLIAM E. BURKE, Respondent, *v.* THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK, Appellant.

APPEAL. The fact that certain points made upon the argument of a case in the Court of Appeals are not discussed in the opinion of the court upon the decision thereof does not warrant the conclusion that they were overlooked.

(Submitted March 5, 1906; decided March 13, 1906.)

MOTION for re-argument. (See 184 N. Y. 77.)

Moses Shire for motion.

J. H. Metcalf and *Clarence M. Bushnell* opposed.

Per Curiam. Our opinion reversing the judgments below rested on the single point that the Independent Company was vested with the title and entire insurable interest in this property in case of loss by fire; that it was its duty under the express provisions of the agreement to take out the policy of insurance in its name, the Cunningham Company paying the premiums.

The plaintiff bases this motion for re-argument on the ground that the court overlooked the fourth finding of fact, which reads as follows:

"That after said contract was entered into, and before the fire hereinafter referred to, L. Springer Cunningham, then treasurer and manager of the Cunningham Company, and one Sayre, then vice-president and treasurer of the Independent Company, on behalf of their respective companies, entered into a parol agreement whereby the said Cunningham Company assumed liability to the Independent Company for any loss by fire to the property described in said policy of insurance to the amount to which this defendant would be liable to the insured under said policy of insurance."

It is difficult to understand how the counsel for plaintiff reaches the conclusion that the court overlooked this finding of fact when it was fully discussed in both briefs. The fact that certain points made upon argument are not discussed in the opinion does not warrant the conclusion that they were overlooked. The fourth finding of fact is without evidence to support it, and the motion for re-argument should be denied, with ten dollars costs.

CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ., concur.

Motion denied.

CHARLES HARRIMAN et al., Appellants, *v.* THE CITY OF YONKERS, Respondent.

Harriman v. *City of Yonkers*, 109 App. Div. 246, appeal dismissed. (Argued February 28, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 17, 1905, which reversed an order of Special Term denying a motion to amend and modify an order entered upon the remittitur of the Court of Appeals and granted said motion.

James M. Hunt for appellants.

Thomas F. Curran for respondent.

Appeal dismissed, with costs; no opinion.

Concur: O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ. CULLEN, Ch. J., votes for affirmance. Not sitting: WILLARD BARTLETT, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FOURTEENTH STREET REALTY COMPANY, Appellant, *v.* OTTO KELSEY, as Comptroller of the State of New York, Respondent.

People ex rel. Fourteenth St. R. Co. v. *Kelsey*, 110 App. Div. 797, affirmed. (Argued February 28, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 8, 1906, which affirmed a determination of the defendant in assessing a franchise tax upon the relator for the year ending October 31, 1904.

Edmond E. Wise for appellant.

Julius M. Mayer, Attorney-General (*Horace McGuire* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Not voting: O'BRIEN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOSEPH FENNELLY, Respondent, *v.* AMALGAMATED COPPER COMPANY et al., Appellants.

People ex rel. Fennelly v. *Amalgamated Copper Co.*, 110 App. Div. 892, affirmed.

(Argued February 28, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1905, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to permit an inspection of its stock book by the relator.

James M. Beck and *Carl A. Mead* for appellants.

Edward J. McGuire for respondent.

Order affirmed, with costs. The power of the court to exercise discretion is not presented by the record, the court having exercised its discretion in favor of the relator; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HUBERT APARTMENT ASSOCIATION, Appellant, *v.* OTTO KELSEY, as Comptroller of the State of New York, Respondent.

People ex rel. Hubert Apartment Assn. v. *Kelsey*, 110 App. Div. 617, affirmed.

(Argued February 28, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 8, 1906, which affirmed a determination of the defendant in assessing a franchise tax against the relator for the year ending October 31, 1904.

Nelson S. Spencer for appellant.

Julius M. Mayer, Attorney-General (*Horace McGuire* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Accounting of JOHN M. BOWERS, as Executor of and Trustee under the Will of WILLIAM B. COOPER, JR., Deceased.

MATILDA H. COOPER, Individually and as Executrix of EDWARD A. COOPER, Deceased, Appellant; THEODORE P. COOPER et al., Respondents.

Matter of Bowers, 109 App. Div. 566, affirmed.
(Argued March 1, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 13, 1905, which modified and affirmed as modified a decree of the New York County Surrogate's Court directing distribution of the estate of William B. Cooper, deceased.

James E. Duross and *Frank L. Holt* for appellant.

James W. Gerard, Latham G. Reed and *Manfred W. Ehrich* for respondents.

Order affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THOMAS ARCHER, Appellant, *v.* WILLAM MCADOO, as Police Commissioner of the City of New York, Respondent.

People ex rel. Archer v. *McAdoo*, 110 App. Div. 740, affirmed.
(Argued March 1, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 12, 1906, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to grade the relator as a patrolman of the sixth grade in the police department of the city of New York and denied said motion.

R. Percy Chittenden for appellant.

John J. Delany, Corporation Counsel (*James D. Bell* of counsel), for respondent.

Order affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY et al., Respondents, *v.* THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NEW YORK et al., Appellants.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES AMM et al., Respondents, *v.* THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NEW YORK et al., Appellants.

People ex rel. Amm v. *Board of Railroad Comrs.*, 103 App. Div. 123, affirmed.
(Argued March 1, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, made March 8, 1905, which reversed a determination of the State Board of Railroad Commissioners granting a certificate of con-

venience and necessity under section 59 of the Railroad Law.

Tracy C. Becker and *Spencer Clinton* for appellants.

Simon Fleischmann, *Maurice C. Spratt* and *Charles A. Pooley* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

BANK OF NIAGARA, Plaintiff, *v.* ASHTON B. TALBOT, Individually and as Executor of CALISTA M. TALBOT, Deceased, Respondent, and HELEN M. KENNEDY et al., Appellants, Impleaded with Others.

Bank of Niagara v. *Talbot*, 110 App. Div. 519, affirmed.
(Argued March 2, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 16, 1906, which affirmed an order of the Erie County Court confirming the report of a referee in an action to foreclose a mortgage and directing distribution of surplus moneys.

Simon Fleischmann, *William R. Pooley* and *J. Boardman Scovell* for appellants.

Tracy C. Becker and *Lincoln A. Groat* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ROBERT L. MARTIN et al., Appellants.

People v. *Martin*, 108 App. Div. 366, appeal dismissed.
(Submitted March 2, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

November 15, 1905, which affirmed an order of Special Term denying an application for a change of venue.

Franklin Bien for appellants.

William Travers Jerome, District Attorney (*Robert S. Johnstone* of counsel), for respondent.

Appeal dismissed; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Application of ROBERT HAMBURGER, Appellant, for a Writ of Mandamus against THE BOARD OF ESTIMATE AND APPORTIONMENT OF THE CITY OF NEW YORK, Respondent.

Matter of Hamburger v. *Board of Estimate*, 109 App. Div. 427, appeal dismissed.

(Submitted March 2, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 29, 1905, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to fix the salary of the relator and denied said motion.

Joseph I. Berry and *Henry K. Davis* for appellant.

John J. Delany, Corporation Counsel (*Theodore Connoly* and *Charles A. O'Neil* of counsel), for respondent.

Appeal dismissed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Accounting of KATHARINA WOHLGEMUTH et al., as Executors of CHARLES WOHLGEMUTH, Deceased, Respondents.

VILLAGE OF SEEWEN, Appellant.

Matter of Wohlgemuth, 110 App. Div. 644, affirmed.
(Argued March 2, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 29, 1906, which affirmed a decree of the New York County Surrogate's Court settling the accounts of the executors herein and directing distribution of the funds in their hands.

Lucius H. Beers and *Darius E. Peck* for appellant.

Henry Meyer and *Andrew S. Hamersley* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOSEPH FENNELLY, Respondent, *v.* THE UNITED COPPER COMPANY et al., Appellants.

People ex rel. Fennelly v. *United Copper Co.*, 110 App. Div. 892, affirmed.
(Submitted March 2, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 19, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendants to permit an inspection of the company's stock book.

Dean Emery and *Frederic R. Kellogg* for appellants.

Edward J. McGuire for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. PATRICK LOUGHRAN, Respondent, *v.* WILLIAM FLYNN, as Warden of the City Prison of the City and County of New York, Defendant.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant.

People ex rel. Loughran v. *Flynn*, 110 App. Div. 279, affirmed.
(Argued March 2, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 16, 1906, which reversed an order dismissing a writ of habeas corpus and directed the discharge of the relator from custody.

Julius M. Mayer, Attorney-General (*William E. Schenck* of counsel), for appellant.

D. Cady Herrick for respondent.

Order affirmed, with costs, on prevailing opinion below.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

NEW YORK ARCHITECTURAL TERRA COTTA COMPANY, Plaintiff, *v.* JOHN T. WILLIAMS, Appellant, and FAGAN IRON WORKS, Respondent.

N. Y. Arch. Terra Cotta Co. v. *Williams*, 102 App. Div. 1, affirmed.
(Argued March 6, 1906; decided March 20, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 11, 1905, affirming a judgment in favor of the defendant Fagan Iron Works entered upon the report of a referee.

Richard T. Greene for appellant.

Frederick Hulse for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE HILLS BROTHERS COMPANY, Respondent, *v.* HEINRICH VOGEMANN et al., Appellants.

Hills Brothers Co. v. *Vogemann*, 110 App. Div. 888, affirmed.
(Argued March 7, 1906; decided March 20, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 22, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

John Notman and *Wilhelmus Mynderse* for appellants.

C. N. Bovee for respondent.

Judgment affirmed, with costs, on opinion in *Rosenstein* v. *Vogemann* (184 N. Y. 325).

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ. Not sitting: WILLARD BARTLETT, J.

ISIDOR WORMSER, JR., Appellant, *v.* METROPOLITAN STREET RAILWAY COMPANY et al., Respondents.

(Submitted March 12, 1906; decided March 20, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 184 N. Y. 83.)

BRIDGET O'DONNELL, Respondent, *v.* THE CITY OF SYRACUSE, Appellant.

(Submitted March 12, 1906; decided March 20, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 184 N. Y. 1.)

WILLIAM BIGGS, Appellant, *v.* CITY OF GENEVA, Respondent.

Biggs v. *City of Geneva*, 100 App. Div. 25, affirmed.
(Argued March 12, 1906; decided March 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 22, 1904, which reversed an order of the court at a Trial Term denying a motion for a new trial after a verdict

in favor of plaintiff, and granted such motion upon questions of law only, the facts having been examined and no error found therein.

John Gillette for appellant.

W. Smith O'Brien for respondent.

EDWARD T. BARTLETT, J. The plaintiff seeks to recover damages of the city of Geneva for personal injuries caused by its negligence in permitting ice to form on the sidewalk upon which he fell, fracturing his wrist.

The charter of defendant provides that no action can be maintained against the city for personal injuries unless notice in writing "of the intention to claim damages, and of the time and place at which the injuries were received, and the nature and extent of such injuries, shall have been filed with the corporation counsel within one month after such injury shall have been received."

The plaintiff failed to serve this notice within the time prescribed. The record discloses no reason relieving plaintiff from complying with this statutory requirement, which is a condition precedent to beginning the action.

In *Jones* v. *City of Albany* (151 N. Y. at p. 226) Chief Judge ANDREWS said: "But the legislature may regulate the right to bring an action against a municipal corporation for a tort, or upon a contract, by imposing conditions precedent to be observed by the plaintiff, or it may make a special statute of limitations, thereby changing the ordinary rule and restricting the usual remedy in such cases."

In the case at bar the period of one month, within which to serve the notice of injury, was reasonable under the facts proved. The question, therefore, is not presented whether an act prescribing a period so brief as to be unreasonable and oppressive, within which to serve notice of injury, would be a constitutional exercise of legislative power.

The order of the Appellate Division should be affirmed, with costs, and judgment absolute awarded to defendant, with costs, upon the stipulation.

CULLEN, Ch. J., GRAY, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ., concur.

Ordered accordingly.

THE NIAGARA FIRE INSURANCE COMPANY, Appellant, *v.* CAMPBELL STORES, Respondent.

Niagara F. Ins. Co. v. *Campbell Stores*, 101 App. Div. 400, affirmed.
(Argued February 16, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 28, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Edgar J. Nathan and *Michael H. Cardozo* for appellant.

Henry W. Jessup for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT and CHASE, JJ. Not sitting: HAIGHT, J. Absent: CULLEN, Ch. J.

TOWN OF PALATINE et al., Appellants, *v.* THE CANAJOHARIE WATER SUPPLY COMPANY et al., Respondents.

Town of Palatine v. *Canajoharie Water Supply Co.*, 90 App. Div. 548, affirmed.
(Argued March 8, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 18, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

Henry V. Borst and *Charles W. Wheeler* for appellants.

Andrew J. Nellis and *B. C. Fox* for respondents.

Judgment affirmed, with costs, with leave to appellants to apply to the Supreme Court for such relief as they may be advised; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WILLARD BARTLETT and HISCOCK, JJ. Absent: WERNER, J.

THE CITY OF NEW YORK, Respondent, *v.* CASTLE BRAID COMPANY, Appellant.

City of New York v. *Castle Braid Co.*, 92 App. Div. 622, affirmed.
(Argued March 8, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 25, 1904, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court subject to its opinion and an order denying a motion for a new trial.

Joseph M. Proskauer, *Jacob A. Cantor* and *John M. Stearns* for appellant.

John J. Delany, *Corporation Counsel* (*Theodore Connoly* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WILLARD BARTLETT and HISCOCK, JJ. Absent: WERNER, J.

CARRIE LOUSHAY, as Administratrix of the Estate of ADELBERT E. LOUSHAY, Deceased, Appellant, *v.* ERIE RAILROAD COMPANY, Respondent.

Loushay v. *Erie R. R. Co.*, 95 App. Div. 102, affirmed.
(Argued March 8, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 7, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

William Vanamee, *Abram F. Servin* and *Thomas Watts* for appellant.

Henry Bacon and *Joseph Merritt* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WILLARD BARTLETT and HISCOCK, JJ. Absent: WERNER, J.

MARY A. WINNE, Appellant, *v.* HERBERT WINNE, Respondent.

Winne v. *Winne*, 95 App. Div. 48, affirmed.
(Argued March 8, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 15, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Lewis E. Carr and *Charles Irving Oliver* for appellant.

P. C. Dugan for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WILLARD BARTLETT and HISCOCK, JJ. Absent: WERNER, J.

WALDORF-ASTORIA SEGAR COMPANY, Respondent, *v.* WALTER J. SALOMON, Defendant, and ACKER, MERRALL & CONDIT COMPANY, Appellant.

Waldorf-Astoria Segar Co. v. *Salomon*, 109 App. Div. 65, affirmed.
(Argued March 9, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 15, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Jordan J. Rollins, *Alfred A. Wheat* and *Theodore H. Lord* for appellant.

Morris J. Hirsch and *Benjamin N. Cardozo* for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

HELIOS-UPTON COMPANY, Respondent, *v.* ORLANDO F. THOMAS et al., Appellants, Impleaded with Another.

Helios-Upton Co. v. *Thomas*, 96 App. Div. 401, affirmed.
(Argued March 12, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 15, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Richard A. Irving for appellants.

Herbert C. Smyth and *Millard F. Tompkins* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

ROUND ISLAND COMPANY, Appellant, *v.* FLORENCE BULLOCH, Respondent.

Round Island Co. v. *Bulloch*, 100 App. Div. 510, affirmed.
(Argued March 12, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 3, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

Henry Purcell for appellant.

Joseph Atwell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

ANNA M. GRANNEMANN et al., by CHRISTIAN ROTHMYER, Their Guardian ad Litem, Respondents, *v.* LOUISE H. GRANNEMANN, Individually and as Special Guardian of ANNA M. GRANNEMANN et al., Appellant, and ARTHUR E. GRANNEMANN et al., Respondents.

Grannemann v. *Grannemann*, 95 App. Div. 37, affirmed.
(Argued March 13, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 26, 1904, modifying and affirming as modified a judgment in favor of plaintiffs and defendants, respondents, entered upon a decision of the court on trial at Special Term.

Robert J. Landon for appellant.

A. J. Dillingham and *Edwin C. Angle* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Not sitting: CHASE, J.

J. H. LABAREE COMPANY, Appellant, *v.* GEORGE W. CROSSMAN et al., Respondents.

Labaree Co. v. *Crossman*, 100 App. Div. 499, affirmed.
(Argued March 13, 1906; decided March 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 6, 1905, affirming a judgment in favor of defendants entered upon the report of a referee.

Edmund L. Mooney, *Frederick A. Card* and *Laurence A. Sullivan* for appellant.

John Notman for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

SUSAN MOUNT, as Administratrix with the Will Annexed of MARIA B. MOUNT, Deceased, Respondent, *v.* DANIEL S. TUTTLE, Bishop of Missouri, et al., Respondents, and DANIEL S. TUTTLE as Senior Bishop of the Protestant Episcopal Church, et al., Appellants.

(Submitted February 26, 1906; decided March 27, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 183 N. Y. 358.)

CHRISTOPHER F. TAUTPHOEUS, Respondent, *v.* HARBOR AND SUBURBAN BUILDING AND SAVINGS ASSOCIATION, Appellant.

Reported below, 104 App. Div. 451.
(Submitted March 19, 1906; decided March 27, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 18, 1905, reversing a judgment in favor of plaintiff, entered upon a decision of the court at a Trial Term without a jury and granting a new trial.

The motion was made upon the grounds that the judgment of reversal being unanimous was not appealable as of right to the Court of Appeals; that permission to appeal had not been granted; that questions of fact were involved which were not determined by the decision of the trial court, and that no exceptions on behalf of the appellant appear in the record.

Alexander S. Bacon for motion.

Hector M. Hitchings opposed.

Motion denied, with ten dollars costs.

RUDOLPH A. BREIDENBACH, as Trustee in Bankruptcy of GEORGE J. RAINESS, Respondent, *v.* DAVID MAYER, Appellant.

Reported below, 110 App. Div. 891.
(Submitted March 19, 1906; decided March 27, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the Court of Appeals had no jurisdiction to entertain the appeal, the decision of the Appellate Division being unanimous and permission to appeal not having been granted; that the appellant's exceptions were frivolous and no questions of law were raised thereby.

George Malraison for motion.

Milton Mayer opposed.

Motion denied, with ten dollars costs.

NEW YORK CARBONIC ACID GAS COMPANY, Respondent, *v.* THE GEYSERS NATURAL CARBONIC ACID GAS COMPANY, Appellant.

N. Y. Carbonic Acid Gas Co. v. *Geysers Natural Carbonic Acid Gas Co.*, 103 App. Div. 598, affirmed.
(Argued March 7, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 18, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

James W. Verbeck for appellant.

Edgar T. Brackett for respondent.

Judgment affirmed, with costs; no opinion.

Concur: O'BRIEN, HAIGHT, VANN, WERNER and HISCOCK, JJ.; CULLEN, Ch. J., and WILLARD BARTLETT, J., vote for modification of the judgment.

FILIP DEUTSCH, Appellant, *v.* METROPOLITAN STREET RAILWAY COMPANY, Respondent.

Deutsch v. *Metropolitan Street Ry. Co.*, 99 App. Div. 624, affirmed.
(Argued March 14, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 10, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Charles Steckler and *Levin L. Brown* for appellant.

Bayard H. Ames and *Henry A. Robinson* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, WERNER and CHASE, JJ. Dissenting: EDWARD T. BARTLETT, VANN and WILLARD BARTLETT, JJ.

JOHN A. CAMPBELL et al., Appellants, *v.* JAMES EMSLIE, Respondent.

Campbell v. *Emslie*, 101 App. Div. 369, affirmed.
(Argued March 14, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 18, 1905, affirming a judgment in favor of defend-

ant entered upon a verdict and an order denying a motion for a new trial.

Franklin Pierce and *Arthur J. Baldwin* for appellants.

J. Campbell Thompson and *Roger Foster* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

THERESA LUESENHOP, Appellant, *v.* BARBABA EINSFELD, Respondent.

Luesenhop v. *Einsfeld*, 98 App. Div. 68, reversed.
(Argued March 15, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 18, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

Eugene Van Voorhis for appellant.

Charles Diebold, Jr., for respondent.

Judgment reversed and new trial granted, costs to abide event, on dissenting opinion of HISCOCK, J., below.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT and CHASE, JJ. Dissenting: HAIGHT, J.

MINNIE A. BLANCHARD, Plaintiff, *v.* GORDON B. ARCHER et al., Respondents, and WILLIAM C. JOHNSON, Appellant, Impleaded with Others.

Blanchard v. *Archer*, 102 App. Div. 627, affirmed.
(Argued March 15, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

March 18, 1905, affirming an amended final judgment in favor of defendants, respondents, in an action for partition.

John A. Garver and *Harold Swain* for appellant.

Jason B. Parrish for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT and CHASE, JJ. Dissenting: EDWARD T. BARTLETT, J. Not voting: VANN, J. Not sitting: WILLARD BARTLETT, J.

AGNES M. HOHMAN, Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Hohman v. *N. Y. C. & H. R. R. R. Co.*, 100 App. Div. 17, affirmed.
(Argued March 15, 1906; decided April 3, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 7, 1904, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

J. W. Shea for appellant.

Henry Purcell for respondent.

Order affirmed and judgment absolute ordered against plaintiff on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Not sitting: GRAY, J.

RUDOLPH M. HAAN, Appellant, *v.* SARAH E. FOX, Respondent.

Haan v. *Fox*, 99 App. Div. 624, affirmed.
(Argued March 16, 1906; decided April 3, 1906.)

APPEAL from a final judgment, entered March 15, 1905, upon an order of the Appellate Division of the Supreme

Court in the first judicial department affirming an interlocutory judgment of Special Term sustaining a demurrer to the complaint.

S. Livingston Samuels and *Myron H. Oppenheim* for appellant.

John A. Garver for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

PATRICK CAREY, Appellant, *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Carey v. *N. Y. C. & H. R. R. R. Co.*, 90 App. Div. 611, affirmed.
(Argued March 16, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 23, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

J. W. Shea for appellant.

Thomas D. Watkins for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Not sitting: GRAY, J.

JOHN G. MCCULLOUGH et al., Appellants and Respondents, *v.* THE BROAD EXCHANGE COMPANY et al., Respondents and Appellants.

McCullough v. *Broad Exchange Co.*, 101 App. Div. 566, affirmed.
(Argued March 16, 1906; decided April 3, 1906.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

March 17, 1905, modifying and affirming as modified a judgment in favor of plaintiffs entered upon the report of a referee.

Austen G. Fox, *Edward R. Greene* and *Winfred T. Denison* for plaintiffs, appellants and respondents.

Edward E. Sprague for defendants, respondents and appellants.

Judgment affirmed, without costs to either party; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

JACOB WICKS, JR., Respondent, *v.* LONDON AND LANCASHIRE FIRE INSURANCE COMPANY, Appellant.

Wicks v. *London & L. Fire Ins. Co.*, 102 App. Div. 615, affirmed.
(Argued March 16, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 23, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

Ernest A. Cardozo and *Michael H. Cardozo* for appellant.

Gustav Lange, Jr., for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

JACOB WICKS, JR., Respondent, *v.* LONDON AND LANCASHIRE FIRE INSURANCE COMPANY, Appellant.

Wicks v. *London & L. Fire Ins. Co.*, 102 App. Div. 615, affirmed.
(Argued March 16, 1906; decided April 3, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

March 17, 1905, which reversed a judgment in favor of defendant entered upon a decision of the court at a Trial Term without a jury and an order denying a motion for a new trial.

Ernest A. Cardozo and *Michael H. Cardozo* for appellant.

Gustav Lange, Jr., for respondent.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

In the Matter of MARGARET M. FOX in Behalf of EDWARD J. RUSSELL, Appellant, for Writs of Habeas Corpus and Certiorari.

THE MEDICAL SUPERINTENDENT OF THE STATE HOSPITAL FOR INSANE PATIENTS AT DANNEMORA, Respondent.

Matter of Fox, 110 App. Div. 919, affirmed.
(Submitted March 19, 1906; decided April 3, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 29, 1905, which affirmed an order of Special Term dismissing writs of habeas corpus and certiorari herein.

Charles E. Le Barbier for appellant.

Julius M. Mayer, Attorney-General (*Danforth E. Ainsworth* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Not sitting: CHASE, J.

MARK DUNTZ, as Trustee for the Holders of Bonds and Coupons Secured by a Mortgage Executed by the GRANGER BREWING COMPANY, Appellant, *v.* GRANGER BREWING COMPANY, Defendant, and PFAUDLER COMPANY, Respondent, Impleaded with Others.

Duntz v. *Granger Brewing Co.*, 96 App. Div. 631, affirmed.
(Argued March 19, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered February 21, 1905, affirming a judgment in favor of respondent herein entered upon a decision of the court on trial at Special Term.

Albert H. Harris and *Thomas K. Smith* for appellant.

Hiram R. Wood for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Not sitting: CHASE, J.

DOUGLAS W. GRAY, Appellant, *v.* ISAAC MEYER et al., Respondents.

Gray v. *Meyer*, 100 App. Div. 513, affirmed.
(Argued March 19, 1906; decided April 3, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 3, 1905, affirming a judgment in favor of defendants entered upon a verdict directed by the court and an order denying a motion for a new trial.

Francis E. Wood for appellant.

Warren J. Cheney for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT and VANN, JJ. Dissenting: WILLARD BARTLETT, and CHASE, JJ.

GAETANO RIOLA, Appellant, *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Riola v. *N. Y. C. & H. R. R. R. Co.*, 97 App. Div. 252, affirmed.
(Argued March 20, 1906; decided April 3, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 27, 1904, which reversed an order of the court at a Trial Term denying a motion for a new trial after a verdict had been rendered in favor of plaintiff.

H. W. Rippey and *George Raines* for appellant.

Daniel M. Beach for respondent.

Order affirmed and judgment absolute ordered for defendant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT and CHASE, JJ. Not voting: VANN and WILLARD BARTLETT, JJ. Not sitting: GRAY, J.

JAMES B. MURRAY, Respondent, *v.* HARBOR AND SUBURBAN BUILDING AND SAVINGS ASSOCIATION, Appellant

Murray v. *Harbor & Suburban B. & S. Assn.*, 91 App. Div. 397, affirmed.
(Submitted March 21, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 18, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Alexander S. Bacon for appellant.

Charles I. McBurney for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

ISRAEL BOSS, an Infant, by ABRAHAM BOSS, His Guardian ad Litem, Appellant, *v.* SENDER JARMULOWSKY, Respondent.

Boss v. *Jarmulowsky*, 81 App. Div. 577, appeal dismissed.
(Submitted March 21, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 24, 1903, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

Abraham Levy and *K. Henry Rosenberg* for appellant.

Morris Clark and *Harold Nathan* for respondent.

Appeal dismissed, with costs, under subdivision 2 of section 191 of the Code of Civil Procedure, as it was not allowed by the Appellate Division or by a judge of this court; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

RASHEED SALEEBY, Respondent, *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, Appellant.

Saleeby v. *Central R. R. Co. of New Jersey*, 99 App. Div. 163, affirmed.
(Argued March 21, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 29, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Robert Thorne for appellant.

James A. Kelly for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

MAX OBERFELDER, Respondent, *v.* NATIONAL DISTILLING COMPANY, Appellant.

Oberfelder v. *National Distilling Co.*, 100 App. Div. 516, affirmed.
(Argued March 21, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 16, 1905, affirming a judgment in favor of plaintiff and an order denying a motion for a new trial.

Harold H. Bowman and *Henry H. Bowman* for appellant.

David Bandler, *Harry L. Haas* and *Henry Gottgetreu* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

ABBIE J. GANNETT, Appellant, *v.* SCHENECTADY RAILWAY COMPANY, Respondent.

Gannett v. *Schenectady Ry. Co.*, 101 App. Div. 611, reversed.
(Argued March 22, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 27, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Robert J. Landon for appellant.

Daniel Naylor, Jr., and *Edward C. Whitmyer* for respondent.

Judgment reversed and new trial granted, costs to abide event, on the ground that the question of plaintiff's contributory negligence was one of fact for the jury; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Dissenting: GRAY, J. Not sitting: CHASE, J.

THE CITY OF NEW YORK, Respondent, *v.* ARTEMAS H. HOLMES, Appellant.

City of New York v. *Holmes*, 104 App. Div. 630, affirmed.
(Submitted March 22, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 1, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury and an order denying a motion for a new trial.

Artemas H. Holmes for appellant.

John J. Delany, Corporation Counsel (*Theodore Connoly* and *Royal E. T. Riggs* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

GEORGE LEASK et al., as Executors of OLIVER W. BUCKINGHAM, Deceased, Respondents, *v.* J. HARVIE DEW, Appellant.

Leask v. *Dew*, 102 App. Div. 529, affirmed.
(Argued March 22, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 5, 1905, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

John M. Scribner for appellant.

T. S. Ormiston for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

HELENA WEIXELBAUM, as Administratrix of the Estate of MOSES WEIXELBAUM, Deceased, Respondent, *v.* NEW YORK CITY RAILWAY COMPANY, Appellant.

Weixelbaum v. *New York City Ry. Co.*, 103 App. Div. 596, affirmed.
(Argued March 22, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 3, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Bayard H. Ames and *Henry A. Robinson* for appellant.

Charles Steckler and *Levin L. Brown* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

SAMUEL V. HOFFMAN et al., as Trustees under the Will of EUGENE A. HOFFMAN, Deceased, Respondents, *v.* SAMUEL V. ABEL, Appellant, Impleaded with Others.

Hoffman v. *Abel*, 103 App. Div. 597, affirmed.
(Submitted March 22, 1906; decided April 6, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 3, 1905, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

William L. Stone, Jr., for appellant.

Paul R. Towne and *William H. Harris* for respondents.

Judgment affirmed, with costs, and $1,000 damages awarded by way of costs for the delay, under subdivision 5 of section 3251 of the Code of Civil Procedure; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

EMILE R. LATTAN et al., Appellants, *v.* ADELINE VAN NESS, Individually and as Administratrix of the Estates of FANNY A. LATTAN and ANGELICA LATTAN, Deceased, et al., Respondents.

Lattan v. *Van Ness*, 107 App. Div. 393, affirmed.
(Argued March 23, 1906; decided April 6, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered August 31, 1905, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Reuben Leslie Maynard for appellants.

Benjamin F. Tracy and *George Richards* for respondents.

Order affirmed and judgment absolute ordered against plaintiffs on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

JOHN STEWART, Appellant, *v.* HORACE RUSSELL et al., as Executors and Trustees under the Will of HENRY HILTON, Deceased, Respondent.

Stewart v. *Russell*, 91 App. Div. 310, affirmed,
(Argued March 21, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 23, 1904, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at Trial Term.

This is an action of ejectment commenced in July, 1901, to recover the possession of certain premises known as Nos. 726,

728 and 730 Broadway in the city of New York. Several defenses were pleaded in the answer, but no evidence was given to establish them as the complaint was dismissed at the close of the plaintiff's case.

Albert Stickney, R. Floyd Clarke and *Lewis S. Burchard* for appellant.

David McClure and *James S. Darcy* for respondents.

Per Curiam. Alexander T. Stewart, a naturalized citizen of the United States, after acquiring the premises in question by purchase, died in 1876 seized and possessed of the same. They are situated in the city of New York where he had resided for a long time and the action was brought on the theory that he died intestate. He left no descendant, but some evidence was given tending to show that he left him surviving one William Stewart, a cousin, who died in 1888 at the age of about sixty years, having always been a non-resident alien, leaving the plaintiff, his grandson, also a non-resident alien during his entire life, as one of the persons entitled to inherit from him, provided he died intestate, and provided also that the right to inherit was not defeated by alienage. No declaration of an intention to become a citizen was ever made by the plaintiff or by any of his ancestors, nor has any attempt to convey said premises been made either by him or by any ancestor.

When the plaintiff rested the trial court dismissed his complaint solely for the reason "that the plaintiff, being an alien, bases his right to recovery upon his immediate ancestor, who was an alien also at the time of his death as well as at the time that he took under A. T. Stewart, if he took at all." No other question was considered either by the trial court or by the Appellate Division, which unanimously affirmed the judgment rendered by the trial court and for substantially the same reason.

The only question presented for decision is whether lands in this state inherited in 1876 by a non-resident alien from a naturalized citizen, who took by purchase, could be inherited in 1888 from such non-resident alien by his nearest descendant, who was also a non-resident alien?

This question is answered by our recent decision in *McCormack* v. *Coddington* (184 N. Y. 467), in which the facts were more favorable to the plaintiff then before the court than the facts of this case are to the plaintiff now before us. We affirm the judgment appealed from on our opinion in that case, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment affirmed.

ARTHUR T. DAVERN, Appellant, *v.* WILLIAM B. ROCKWELL, as Receiver of the SYRACUSE, LAKESIDE AND BALDWINSVILLE RAILWAY, Respondent.

Davern v. *Rockwell*, 105 App Div. 618, affirmed.
(Argued March 23, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 26, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

J. L. Cheney for appellant.

T. E. Hancock and *William S. Farmer* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT and HAIGHT, JJ. Dissenting: VANN, WILLARD BARTLETT and CHASE, JJ.

MARY E. JACKSON, Appellant, *v.* ROBERT W. TAILER, as Executor of PHEBE PEARSALL, Deceased, Respondent.

Jackson v. *Tailer*, 96 App. Div. 625, affirmed.
(Submitted March 26, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June

22, 1904, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Charles A. Jackson and *John Hetherington* for appellant.

Henry L. Bogert and *Edward B. Whitney* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

PARSONS BROTHERS (INCORPORATED), Appellant, *v.* THE CITY OF NEW YORK et al., Respondents.

Parsons Brothers (Incorporated) v. *City of New York*, 107 App. Div. 324, affirmed.

(Argued March 26, 1906; decided April 17, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 3, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

Conrad Saxe Keyes for appellant.

John J. Delany, Corporation Counsel (*James D. Bell* and *Patrick E. Callahan* of counsel) for city of New York, respondent.

James A. C. Johnson for the Hilton & Dodge Lumber Company et al., respondents.

Order affirmed and judgment absolute ordered against plaintiff on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

LEMUEL L. WILLIAMS, as Executor of MARIE L. WILLIAMS, Deceased, Respondent, *v.* MARIE E. SEMPELL BOUL, Appellant.

Williams v. *Boul*, 101 App. Div. 593, affirmed.
(Argued March 26, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 7, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Frederic R. Coudert and *Paul Fuller, Jr.*, for appellant.

Wilford H. Smith for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., GRAY, WERNER, HISCOCK and CHASE, JJ. Dissenting: EDWARD T. BARTLETT, J. Absent: O'BRIEN, J.

JOHN S. FULLER, as Trustee in Bankruptcy of CHARLES E. CALLENDER, Respondent, *v.* EDWIN C. JAMESON et al., Appellants.

Fuller v. *Jameson*, 98 App. Div. 53, affirmed.
(Argued March 26, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 25, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

Frederic R. Coudert, John P. Murray and *Paul Fuller, Jr.*, for appellants.

S. F. Randall for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Absent: O'BRIEN, J. Not sitting: HISCOCK, J.

JOSEPHINE DUMAR, as Administratrix of the Estate of MOSES DUMAR, Deceased, Appellant, *v.* WITHERBEE, SHERMAN & Co., Respondent.

Dumar v. *Witherbee, Sherman & Co.*, 106 App. Div. 616, affirmed.
(Argued March 27, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 8, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Thomas F. Conway for appellant.

Berne A. Pyrke for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Absent: O'BRIEN, J. Not sitting: CHASE, J.

HAROLD NATHAN, as Administrator of the Estate of MARTIN CASSIDY, Deceased, Respondent, *v.* SIMON UHLMANN, as Executor of FREDERICK UHLMANN, Deceased, Appellant, Impleaded with Others.

Nathan v. *Uhlmann*, 101 App. Div. 388, affirmed.
(Argued March 27, 1906; decided April 17, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 18, 1905, which reversed a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial and granted a new trial.

William A. Jenner and *Oscar W. Jeffrey* for appellant.

Harold Nathan for respondent.

Order affirmed and judgment absolute ordered against defendant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

WILLIAM J. UNDERWOOD et al., as Executors of EMORY M. VAN TASSEL, Deceased, Respondents, *v.* THE GREENWICH INSURANCE COMPANY, Appellant.

Underwood v. *Greenwich Ins. Co.*, 103 App. Div. 610, affirmed.
(Argued March 28, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 8, 1905, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

John Notman and *Henry Galbraith Ward* for appellant.

George Richards for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

KATE McGUIRE, Respondent, *v.* WILLIAM ROBERTS, Appellant.

McGuire v. *Roberts*, 107 App. Div. 619, affirmed.
(Argued March 28, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 3, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

C. S. Mereness for appellant.

John N. Carlisle and *J. F. La Rue* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Dissenting: CULLEN, Ch. J. Absent: O'BRIEN, J. Not sitting: HISCOCK, J.

EDMUND G. CHAPMAN, Respondent, *v.* ROBAH ALICE LA DOW, as Executrix of CHARLES LA DOW, Deceased, Appellant, Impleaded with Another.

Chapman v. *La Dow*, 103 App. Div. 598, affirmed.
(Argued March 28, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 10, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee.

J. Newton Fiero for appellant.

Samuel S. Hatt for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Absent: O'BRIEN, J. Not sitting: CHASE, J.

ELISE M. JEWETT, Respondent, *v.* MELINDA P. SCHMIDT et al., Appellants, and FRITZ LEOPOLD SCHMIDT, JR., et al., Respondents.

Jewett v. *Schmidt*, 108 App. Div. 322, affirmed.
(Argued March 28, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 23, 1905, affirming a final judgment of Special Term in an action for the construction of the will of George Parbury Pollen, deceased, and for an accounting.

Barclay E. V. McCarty for appellants.

Thomas J. Falls for plaintiff, respondent.

Walter Carroll Low and *R. Dickinson Jewett* for defendants, respondents.

Judgment affirmed, with costs; no opinion.

Concur: EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. CULLEN, Ch. J., and GRAY, J., dissent on the ground that there was no trust created by the provisions of the will. Absent: O'BRIEN, J.

LOUIS B. PRAHAR, Respondent, *v.* ROSALIE TOUSEY, as Executrix of FRANK TOUSEY, Deceased, Appellant.

Prahar v. *Tousey*, 107 App. Div. 623, affirmed.
(Argued March 29, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 18, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial.

James M. Hunt for appellant.

John E. Brodsky for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

MARGARET WOLF, as Administratrix of the Estate of FREDERICK J. WOLF, Deceased, Appellant, *v.* MANHATTAN CONSUMERS' BREWING COMPANY, Respondent.

Wolf v. *Manhattan Consumers' Brewing Co.*, 103 App. Div. 595, affirmed.
(Argued March 29, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 30, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Adolph L. Pincoffs for appellant.

John Vernou Bouvier, Jr., and *Frank V. Johnson* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

ANNA L. REILLY, as Ancillary Administratrix of the Estate of JOHN REILLY, Deceased, Respondent, *v.* CHARLES Q. FREEMAN et al., Appellants.

Reilly v. *Freeman*, 109 App. Div. 4, affirmed.
(Argued March 30, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 27, 1905, modifying and affirming as modified a judgment in favor of plaintiff entered upon the report of a referee.

Frank S. Black, *Henderson Peck* and *James Demarest* for appellants.

Treadwell Cleveland and *H. W. Hayward* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

ROBERT F. LIVINGSTON, as Receiver of the Property of ARNOLD L. EATON, Respondent, *v.* FRED W. EATON et al., Appellants.

Livingston v. *Eaton*, 90 App. Div. 251, affirmed.
(Argued April 2, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 23, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term.

Myron G. Bronner and *Eugene E. Sheldon* for appellants.

Charles J. Palmer for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Absent: O'BRIEN, J. Not sitting: HISCOCK, J.

MARY E. BECK, as Administratrix of LOUIS BECK, Deceased, Appellant, *v.* THE CATHOLIC UNIVERSITY OF AMERICA, Respondent.

Beck v. *Catholic University of America*, 96 App. Div. 627, affirmed.
(Argued April 2, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 5, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

Alton B. Parker and *Allen Caruthers* for appellant.

Abram I. Elkus and *Joseph M. Proskauer* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

JESSIE O'CONNOR, Appellant, *v.* FREDERICK J. WORTMAN et al., Appellants and JOHN SEIBERT, JR., as Executor and Trustee under the Will of FRANCIS BAUMAN, Deceased, Respondent, Impleaded with Another.

O'Connor v. *Wortman*, 110 App. Div. 920, affirmed.
(Argued April 3, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 8, 1906, affirming a judgment of Special Term in an action for the construction of the will of Francis Bauman, deceased.

Francis A. McCoskey and *Jesse Silbermann* for appellants.

Charles A. B. Pratt for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

ELIZABETH SCHERMERHORN, as Executrix of ABRAM L. SCHERMERHORN, Deceased, Appellant, *v.* RANSEN GARDENIER, Respondent.

Schermerhorn v. *Gardenier*, 107 App. Div. 564, affirmed.
(Argued April 3, 1906; decided April 17, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered October 2, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

W. A. Hendrickson and *G. S. Collier* for appellant.

Edson R. Harder for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Absent: O'BRIEN, J. Not sitting: CHASE, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* E. ARDEN NOBLETT, Appellant.

People v. *Noblett*, 96 App. Div. 293, affirmed.
(Argued April 3, 1906; decided April 17, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 25, 1904, which affirmed a judgment of the Court of General Sessions of the Peace in the city of New York entered upon a verdict convicting the defendant of the crime of grand larceny in the first degree.

Clarence E. Thornall for appellant.

William Travers Jerome, *District Attorney* (*Robert S. Johnstone* of counsel) for respondent.

Judgment of conviction affirmed; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

LEMAN W. TYLER, Respondent, *v.* ORANGE SOPER, Appellant.

Tyler v. *Soper*, 102 App. Div. 620, affirmed.
(Argued April 3, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 13, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

E. C. Emerson and *Fred A. Baldwin* for appellant.

Arthur L. Chapman for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Absent: O'BRIEN and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HARRY J. BEBRO, Appellant, *v.* GEORGE BOND, Respondent.

People ex rel. Bebro v. *Bond*, 110 App. Div. 921, appeal dismissed.
(Argued April 16, 1906; decided April 17, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 29, 1905, which modified and affirmed as modified an order of Special Term dismissing a writ of habeas corpus.

The motion was made upon the grounds that no questions of law are involved; that the order of the Appellate Division was discretionary and, therefore, not reviewable; and that no substantial rights are involved, the person named in the writ of habeas corpus being no longer in custody.

Charles C. Lockwood for motion.

Louis Boehm opposed.

Motion granted and appeal dismissed, without costs.

In the Matter of the Petition of JUDSON LAWSON, Respondent, for the Revocation of Liquor Tax Certificate No. 5,674, Issued to JOHN P. WILLIAMS, Appellant.

Matter of Lawson, 109 App. Div. 195, appeal dismissed.
(Argued April 16, 1906; decided April 17, 1906.)

MOTION, by permission, to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 28, 1905, which affirmed an order of Special Term referring the matter in controversy to a referee.

The motion was made upon the ground that the appellant has failed to pay accrued costs and to perfect his appeal by filing the required undertaking.

Elmer E. Cooley for motion.

David M. Neuberger opposed.

Motion granted and appeal dismissed, with ten dollars costs only.

OTTILIE RECKNAGEL, Respondent, *v.* CHARLES H. STEINWAY et al., as Executors and Trustees under the Will of WILLIAM STEINWAY, Deceased, et al., Appellants.

Recknagel v. *Steinway*, 105 App. Div. 561, modified.
(Argued April 2, 1906; decided April 17, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 21, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial.

Henry W. Taft, *Frederick W. Yates* and *Charles Oakes* for appellants.

R. Burnham Moffat for respondent.

Per Curiam. So much has been written in this case that we shall content ourselves with simply stating our conclusions. 1. The plaintiff is not entitled to recover in one sum as for an entire breach of the contract in suit. 2. She is entitled to judgment for all installments due and unpaid on the contract up to the time of the commencement of this action. 3. She is entitled to maintain an action or actions for the payment by the trustees named in the agreement of the installments accrued and to accrue subsequent to the commencement of the action in accordance with the terms of the contract.

The judgment herein should be modified so as to conform to these conclusions, and as so modified affirmed, without costs in this court to either party, and the case is, therefore, remitted to the Special Term with directions to take such proceedings as may be necessary to carry the judgment as modified into effect.

CULLEN, Ch. J., GRAY, WERNER, HISCOCK and CHASE, JJ., concur; EDWARD T. BARTLETT, J., dissents from opinion and votes for affirmance of judgment without modification; O'BRIEN, J., absent.

Judgment accordingly.

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APPEAL.

1. *Unanimous affirmance — Court of Appeals Will Examine Pleadings to Ascertain What Facts Are Admitted.* An exception to the rule that the unanimous affirmance of a judgment by the Appellate Division precludes the Court of Appeals from looking into the record for facts not contained in the findings is not warranted by the fact that the plaintiffs, in an action decided before the re-enactment of section 1023 of the Code of Civil Procedure, did not have an opportunity to obtain at Special Term a ruling upon additional facts which they deemed established by the evidence. It is only the evidence and the proceedings on the trial, however, that the court will not examine to ascertain whether there are facts not found which rest on undisputed evidence or facts found which are unsupported by any evidence. The pleadings being part of the judgment roll and there being no constitutional prohibition of an examination thereof to ascertain what facts are admitted nor any statutory requirement that the findings shall include such facts, they may and should be read by the court, in connection with a decision upon the issues, to ascertain whether the facts admitted and found sustain the judgment. *Jacobson* v. *Brooklyn Lumber Co.* 152

2. *Question of Fact.* An affirmance by the Appellate Division of a judgment entered upon a verdict dismissing a complaint in an action to recover for services in procuring a tenant for defendant's property, upon the ground that the defendant was entitled to a dismissal as a matter of law, sustained, there being evidence from which the jury might have found as a matter of fact that the parties had never agreed upon the terms of a lease. *Levy* v. *McCreery Realty Corpn.* 163

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1. *New York Produce Exchange — Beneficiaries' Interest in Gratuity Fund Assignable as Security for Sums Advanced to Pay Dues and Assessments.* Under a by-law of the New York Produce Exchange, relating to the gratuity fund established pursuant to chapter 36 of the Laws of 1882, which provided that "Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts; but it shall be construed as the solemn agreement of every subscribing member of the New York Produce Exchange to make a gift to the family of each deceased member, and of the exchange to collect and pay over to the family the said gift," while the interest of beneficiaries in such fund cannot be assigned in payment or to secure the payment of a debt having no relation to such fund and in nowise incurred for the purpose of keeping alive their interests in the fund, it is assignable, however, as security for the repayment of such moneys as may be paid by another to keep alive such interests, and without which they must have been absolutely destroyed. *Holmes* v. *Seaman.* 486

2. *Same.* Where the family of a member assigned their interest in the fund to secure his pre-existing personal indebtedness and also "all further sums" which the assignee should during the lifetime of the member pay to the Exchange for "dues or assessments" upon his certificate, and for several years they were paid by the assignee, in an action to determine the title to the fund as between him and the beneficiary, *held*, that the assignment was ineffectual as security for the former indebtedness, but was effectual as to the sums advanced for the dues and assessments necessary to keep the interest of the beneficiary alive. *Id.*

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Obligation of, to persons other than passengers
See NEGLIGENCE, 12–14.

CHAMPERTY.
1. *Employment of Layman by Attorneys to Procure Clients a Misdemeanor and Warrants Forfeiture of Office.* Section 74 of the Code of Civil Procedure, prohibiting attorneys or counselors from procuring retainers by offering or giving any valuable consideration therefor, not only prohibits them from giving it to a desired client for the purpose of obtaining his claim to bring suit upon, but also from paying or agreeing to pay any layman, out of the prospective profits of cases, for services in inducing desired clients to place their claims in the attorneys' hands for

CHAMPERTY — *Continued.*
enforcement; such conduct is champertous and subjects the offending attorney to punishment as for a misdemeanor and also to removal from his office. (§ 75.) *Matter of Clark.* 222

2. *Malpractice — Code Civ. Pro.* § 67. An attorney who, in order to secure his own compensation, settles with the party against whom he has been retained to enforce claims, assigns his contracts of retainer, and notifies his clients to settle directly with such party, agreeing that to the extent of his ability he will facilitate any settlement that the latter may desire to make, is guilty of malpractice under section 67 of the Code of Civil Procedure. *Id.*

CHARTER PARTY.
When charterers, not owners, are liable for loss of goods resulting from alleged negligence in unloading.
See CONTRACT, 3–5.

CHATTEL MORTGAGE.
Foreclosure — remedy — jurisdiction.
See MORTGAGE, 1.

CITIES.
1. *Constitutional Law — Statute* (*L.* 1905, *Ch.* 501) *Amending "White Charter" Constitutional, Although Not Transmitted to Cities Affected Thereby* (*Const. Art.* 12, § 2). The statute (L. 1905, ch. 501) amending the "act for the government of cities of the second class" (L. 1898, ch. 182), commonly called the "White Charter," so that the provisions thereof shall not apply to any city that becomes a city of the second class in the enumeration to be had in the year 1905, until on and after the 1st day of January, 1908, except that the officers provided in such act for such city as becomes a city of the second class after such enumeration shall be elected at the city election to be held on the Tuesday succeeding the first Monday in November, 1907, is constitutional, although a certified copy thereof was not transmitted to any city or cities affected thereby, as required by the Constitution (Art. 12, § 2) in case of special city laws; since such statute is a general, not a special, city law under the provisions of said section defining general city laws as "those which relate to all the cities of one or more classes," and special city laws as those "which relate to a single city or to less than all the cities of a class." By its express terms the statute relates to all of the cities of the state, not then in the second class, which might thereafter come into that class as a result of the enumeration in 1905, so that all of such cities might have a reasonable time to adapt their government to the changed conditions. *Koster* v. *Coyne.* 494

2. *Yonkers* (*City of*) — *Effect of Statute* (*L.* 1905, *Ch.* 501) *When Yonkers Became a City of the Second Class under Enumeration of* 1905. Under the enumeration taken in 1905 the city of Yonkers, previously a city of the third class, governed by a special charter which provided for the election of two aldermen from each ward, became a city of the second class, but the statute (L. 1905, ch. 501) which amended the "White Charter," prevents the original provisions of that charter from so applying to the city of Yonkers as to reduce the number of aldermen from two to one in each ward until January 1, 1908. *Id.*

3. *Same — Construction and Effect of Provisions of Constitution* (*Const. Art.* 12, § 3) *upon Charter Provisions Relating to Election and Terms of Aldermen — Proceedings to Fill Vancancy in Office of Aldermen.* The provisions of the Constitution (Const. art. 12, § 3) providing that "all elections of city officers * * * except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the

CITIES — *Continued.*

term of every such officer shall expire at the end of the odd-numbered year," apply to the election of aldermen and are mandatory; when the city of Yonkers became a city of the second class it became subject to those provisions and was required to elect aldermen on the Tuesday succeeding the first Monday in November, 1905, whose terms would expire at the end of 1907; the terms of the aldermen elected in such city in 1904 for the term of two years to expire in December, 1906, were abridged so as to expire, at the latest, with the last day of December, 1905; but the offices to which such aldermen had been elected were not thereby abolished; until the provisions of the "White Charter" took effect providing for the election of aldermen in November, 1907, to take effect January, 1908, the provisions of the original special charter of the city of Yonkers continued in force and provided for the election of two aldermen from each ward; when, therefore, one of the aldermen of a ward, elected in 1904, for the term of two years, was elected mayor of the city at the election held in November, 1905, and resigned his office as alderman on the thirteenth of that month, there was, consequently, a vacancy and the common council had the power to order a special election to fill such vacancy for a term which will expire December 31, 1907. *Id.*

4. *Resolution Ordering Special Election of Alderman to Fill Vacancy — Immaterial Error.* Although the resolution of the common council, ordering such special election and describing the vacancy to be filled as one "for the unexpired term of two years commencing December 1st, 1904, and ending November 30th, 1906," was erroneous because such term, under the constitutional and statutory provisions applicable thereto, expired in 1905 instead of 1906, such error is to be regarded as an immaterial irregularity which does not affect the validity of the proceedings for such special election. *Id.*

Liability for the omission or commission of corporate acts — when not liable for failure to make provision against floods in stream used as outlet for sewerage system.

See MUNICIPAL CORPORATIONS, 1–3.

CODE OF PROCEDURE.

§ 448 — *Service of Summons on Infant Residing Out of the State — When Regular under the Statute in Force in* 1869 (*Code Pro.* § 448 *and* 2 *R. S. Part* 3, *Ch.* 5, *Tit.* 3, § 12). Where the statutes relating to actions in partition in force in 1869 (Code Pro. § 448 and 2 R. S. part 3, ch. 5, tit. 3, § 12) provided that if any of the parties were unknown or if either of the known parties were minors or of full age residing out of the state, service could be made by publication, or instead thereof, with respect to any known absent party, the petition and notice (under the Code, summons and complaint) might be served personally out of this state, forty days previous to its presentation, without publishing the same, the due and timely service of the summons in an action of partition commenced in 1869 upon an infant defendant and on the person with whom such infant was temporarily residing out of the state, was regular and gave the court jurisdiction of such infant, especially where her mother, with whom she resided when at home within this state, thereafter petitioned, as the next friend of such infant, to be appointed her guardian *ad litem*, and was regularly appointed such guardian and appeared in the action by an attorney who interposed the usual answer submitting the rights and interests of such infant to the protection of the court; the fact that the original affidavit of the service of the summons was defective by reason of the omission of the jurat of the commissioner of deeds before whom it was taken is immaterial where it was subsequently cured by another affidavit which, under an order of the court, was filed *nunc pro tunc* as of the date of the first affidavit. *O'Donaghue* v. *Smith.* 365

CODE OF CIVIL PROCEDURE.

1. § 67 — *Malpractice.* An attorney who, in order to secure his own compensation, settles with the party against whom he has been retained to enforce claims, assigns his contracts of retainer and notifies his clients to settle directly with such party, agreeing that to the extent of his ability he will facilitate any settlement that the latter may desire to make, is guilty of malpractice under section 67 of the Code of Civil Procedure. *Matter of Clark.* 222

2. §§ 74, 75 — *Champerty — Employment of Layman by Attorneys to Procure Clients a Misdemeanor and Warrants Forfeiture of Office.* Section 74 of the Code of Civil Procedure, prohibiting attorneys or counselors from procuring retainers by offering or giving any valuable consideration therefor, not only prohibits them from giving it to a desired client for the purpose of obtaining his claim to bring suit upon, but also from paying or agreeing to pay any layman, out of the prospective profits of cases, for services in inducing desired clients to place their claims in the attorneys' hands for enforcement; such conduct is champertous and subjects the offending attorney to punishment as for a misdemeanor and also to removal from his office. (§ 75.) *Id.*

3. § 484 — *Demurrer upon Ground of Improper Joinder of Causes of Action.* Where, in a stockholder's action, the complaint states two grievances, one of which constitutes a good cause of action in favor of the corporation of which he is a stockholder, and the other does not, and, so far as appears on the face of the complaint, the two grievances were independent transactions having no connection with each other, and there is no allegation that they were committed in pursuance of any common design or agreement, such grievances constitute separate causes of action within the meaning of the Code of Civil Procedure (§ 484) and the rules of pleading, and a demurrer to the complaint upon the ground that several causes of action are improperly united is well taken and should be sustained; nor are the defendants concluded from demurring thereto by a decision of the Special Term denying a motion made by them for an order requiring the plaintiff to separately state and number his two causes of action, upon the ground that there was but one cause of action. *O'Connor* v. *Virginia Passenger & Power Co.* 46

4. § 500 — *Pleading — Denial Should Be Clear and Specific.* A denial contained in an answer of all the allegations contained in specified folios of a complaint, except as hereinafter admitted, is not good pleading. It should not, however, be treated as a nullity and thereby deprive the defendant of his right to trial or to amend; the proper remedy is by a motion to have the answer made more specific and certain. *Thompson* v. *Wittkop.* 117

5. §§ 603, 604 — *Mandatory Injunction.* While under sections 603 and 604 of the Code of Civil Procedure it is within the power of a court of equity, in proper cases, to issue mandatory injunctions, such power is not unlimited, and when the exercise of such power exceeds the limit, it is not a mere error, but void as without jurisdiction. *Bachman* v. *Harrington.* 458

6. §§ 834, 836 — *Will — Mental Incapacity of Testatrix — Erroneous Admission of Evidence Relating to Mental Disease of Relatives.* In a proceeding for the revocation of the probate of a will upon the ground that testatrix, at the time of the execution thereof, was not mentally capable of making a will, it is erroneous to permit the petitioner, in order to supplement and support evidence that the testatrix was afflicted with paresis, and against the objection that such testimony was incompetent and privileged, under section 834 of the Code of Civil Procedure, to prove by two physicians who had attended the mother and brother of testatrix in a professional capacity, and whose knowledge was obtained while attending such persons, and was necessary in order to treat them, that both the

CODE OF CIVIL PROCEDURE — *Continued.*

mother and brother of testatrix had been afflicted with "general paresis;" since, by the express terms of section 836, the provisions of section 834 are made to apply to "any examination of a person as a witness," and the fact that the testimony of the physicians related to patients who were not parties to the proceeding or interested therein, and who were dead at that time, does not take it out of the prohibition of the statute. *Matter of Myer.* 54

7. § 1023 — *Appeal — Unanimous Affirmance — Court of Appeals Will Examine Pleadings to Ascertain What Facts Are Admitted.* An exception to the rule that the unanimous affirmance of a judgment by the Appellate Division precludes the Court of Appeals from looking into the record for facts not contained in the findings is not warranted by the fact that the plaintiffs, in an action decided before the re-enactment of section 1023 of the Code of Civil Procedure, did not have an opportunity to obtain at Special Term a ruling upon additional facts which they deemed established by the evidence. It is only the evidence and the proceedings on the trial, however, that the court will not examine to ascertain whether there are facts not found which rest on undisputed evidence or facts found which are unsupported by any evidence. The pleadings being part of the judgment roll and there being no constitutional prohibition of an examination thereof to ascertain what facts are admitted nor any statutory requirement that the findings shall include such facts, they may and should be read by the court, in connection with a decision upon the issues, to ascertain whether the facts admitted and found sustain the judgment. *Jacobson* v. *Brooklyn Lumber Co.* 152

8. §§ 2365-2386 — *Arbitration — Application of Particular Code Provisions* (§§ 2365-2386) *to Common-law Arbitrations.* While chapter 17, title 8, of the Code of Civil Procedure does not affect common-law arbitrations, "except as otherwise especially prescribed" (§ 2386), this clause indicates that there are provisions therein that were intended to include and apply to such arbitrations. *Hinkle* v. *Zimmerman.* 114

9. *Idem — Common-law Arbitration — Waiver of Oath Must Be in Writing — Code Civ. Pro.* § 2369. Section 2369 of the Code of Civil Procedure, providing that "arbitrators selected either as prescribed in this title *or otherwise* must be sworn, * * * unless the oath is waived by the written consent of the parties to the submission or their attorneys," applies to arbitrators selected under a common-law arbitration; they must be sworn, and where a waiver is relied upon to defeat the award it must be in writing the same as in statutory arbitrations. *Id.*

10. §§ 2472, 2481, 2596, 2712, 2731. — *Surrogate Has No Jurisdiction to Enforce Creditor's Lien against Insurance Moneys under Section* 22, *Domestic Relations Law.* A surrogate has only such jurisdiction as is expressly or by necessary implication conferred by statute. While the tendency of recent legislation has been to enlarge his powers, he has not yet been given the broad powers of a court of equity which are necessary to enforce a creditor's lien upon the proceeds of a policy of insurance issued on the life of a husband in which the wife was named as the beneficiary and the annual premium on which was in excess of $500, and to determine, in a proceeding by a creditor of the estate to compel her as executrix to account, whether as between her individually and the creditors of her deceased husband any part of such proceeds is chargeable with a lien in favor of his creditors under the Domestic Relations Law (L. 1896, ch. 272, § 22). The Code of Civil Procedure (§§ 2472, 2481, 2596, 2712, 2731) confers no such jurisdiction either expressly or impliedly; the amount of insurance purchased by the excess of premiums does not belong to the husband in his lifetime and forms no part of his estate after his death even as to creditors; the premiums paid do not constitute a debt against his wife in favor of himself or his estate; the proceeds are not assets and

CODE OF CIVIL PROCEDURE — *Continued.*

cannot be included in the inventory; they are liable "primarily" for his debts solely by force of the statute; they constitute a separate fund, devoted exclusively to the payment of the deficiency arising after all the assets of the estate have been applied upon the debts, while the surplus, if any, is to be returned to the widow. The phrase "property alleged to belong to the estate," as used in section 2731 of the Code, means property which is "deemed assets" as defined in section 2712, and which may be inventoried under section 2714. An allegation in the petition, therefore, that the insurance moneys were property of the estate, gives the surrogate no jurisdiction to try the question of title or enforce the lien any more than if a similar allegation had been made with reference to the title to real estate or other matters over which the surrogate has no jurisdiction. *Matter of Thompson.* 36

11. §§ 3053, 3057 — *When Writ of Prohibition Will Not Issue to Restrain Prosecution of Action in Justice's Court — Irregular Service of Summons — Remedy.* A justice of the peace has power to entertain an application to set aside the service of a summons; the defendant may specially appear and state the facts upon which he bases his claim of privilege without any waiver of his rights; if in a proper case the justice refuses to set aside the service the remedy is by an appeal. (Code Civ. Pro. §§ 3053, 3057.) The allowance, therefore, in such a case of a writ of prohibition restraining the further prosecution of the action constitutes reversible error, and an order granting the writ must be reversed. *People ex rel. Ballin* v. *Smith.* 96

CODE OF CRIMINAL PROCEDURE.

§§ 485, 517, 519 — *Order Denying Motion to Quash Indictment Appealable.* A motion to dismiss an indictment, although not specifically mentioned in section 485 of the Code of Criminal Procedure, is embraced in the general provisions thereof and is included in and becomes a part of the judgment roll; an order of the trial judge denying such a motion, made upon the ground that the defendant had been compelled to testify against himself before the grand jury, is under section 517 reviewable by the Appellate Division, and under section 519, subdivision 3, by the Court of Appeals; the defendant, therefore, having a complete remedy by appeal, is not entitled to a writ prohibiting the judge from further proceeding with the trial. *People ex rel. Hummel* v. *Trial Term.* 30

COMMISSIONS.

Action to recover.

See APPEAL, 2.

CONDEMNATION PROCEEDINGS.

Measure of compensation.

See EMINENT DOMAIN, 2, 3.

CONGRESS.

Power of, to authorize enactment of state law prohibiting importation and possession of foreign game during close season.

See CONSTITUTIONAL LAW, 2.

CONSTITUTIONAL LAW.

1. *Forest, Fish and Game Law — Provision Prohibiting Possession of Game During Close Season Constitutional* (*Const. Art.* 1, § 6). The provisions of the Forest, Fish and Game Law (L. 1900, ch. 20, as amd. by L. 1902, ch. 194; L. 1902, ch. 317, and L. 1904, ch. 588), prohibiting the possession of game coming from without the state during the close season is not unconstitutional as a deprivation of property without due process of law and is a valid exercise of the police power of the state. *People ex rel. Hill* v. *Hesterberg.* 126

CONSTITUTIONAL LAW — *Continued.*

2. *Power of Congress to Authorize Enactment of New York State Law Prohibiting Importation and Possession of Foreign Game During Close Season.* Congress can authorize an exercise of the police power by a state, which without such authority would be an unconstitutional interference with commerce; and the act of Congress, passed May 25, 1900, providing, "That all dead bodies or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals, or game or song birds transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," confers upon the state of New York the power to enact laws prohibiting the possession of the bodies or flesh of game animals or birds, within certain periods, whether the same be taken within the state or imported from another state or from foreign countries. *Id.*

3. *Construction of Complaint upon Which Warrant for Violation of Game Law Is Issued.* Where the affidavit upon which a warrant was issued for the arrest of a defendant for violating the provisions of the Forest, Fish and Game Law states that the defendant had in his possession, within the prohibited time, certain dead game birds, to wit, one imported golden plover and one imported grouse, the further statement "That said imported golden plover and imported grouse are different varieties of game birds from the game birds known as plover and grouse in the state of New York, and from any birds native to America. They are different in form, shape, size, color and marking from the game birds known as plover and grouse in the state of New York," cannot be urged as a defense, since such statement should be construed as meaning, not that the bird so possessed was not a grouse, but that it was a different variety of grouse, different in form, shape and color, from that which is native to the state of New York; it is for the legislature to determine how far it is necessary or wise to include within the penal provisions of the statute birds of the same family and of a similar character though differing in some respects. *Id.*

Statute amending act for government of cities of the second class constitutional, although not transmitted to cities affected thereby — effect of provisions of Constitution upon charter provisions relating to elections and terms of aldermen.

See CITIES, 1, 3.

Validity of Stock Transfer Tax Act.

See TAX, 4–8.

CONTEMPT.

Violation of void order not punishable as for a civil contempt.

See INJUNCTION, 4.

CONTRACT.

1. *Sales — Contract for Sale of Goods in Bond — When Vendee Entitled to Duty Refunded Thereon.* Where, in a memorandum of sale of imported tobacco, stored in a bonded warehouse, on which the duty had not been fixed, the price named was a certain sum per pound, including the duty thereon, which was estimated at seventy cents per pound, but "if appraised at less," the difference in duty to be allowed vendee, the tobacco to be taken and paid for within five months, and the vendee took and paid for the tobacco within the time named, and in addition thereto also paid the vendors sixty-one cents per pound for the duty as

CONTRACT — *Continued.*

fixed by the collector, the vendors paying over such duty to him, under protest, and thereafter such proceedings were instituted by them that the protest was sustained and the duty reduced to thirty-five cents per pound, the collector refunding to them the excess of duty, out of which they paid fifty per cent for the services of their attorney, leaving the remainder in the hands of the vendors, who refused to pay it over to the vendee upon its demand held that the vendee was entitled to a judgment against the vendors for such balance; since the rights of the parties depend on the meaning of the expression "if appraised at less," which means a lawful appraisal, whether made by the collector or adjudged by the court; it means such an appraisal as the law required and justified, not such as was made by the collector, which was illegal and was treated by the government as illegal. In effect, the sale was subject to the payment of the duty by the vendee, but the vendors were to pay it for the vendee out of moneys furnished for the purpose, so that the vendors must be deemed to have received the refunded duty for the benefit of the vendee who is entitled to it, therefore, less the expenses of collecting it. *Solomon Tobacco Co.* v. *Cohen.* 308

2. *Of sale — Waiver.* Where by the terms of a contract for the sale of ten carloads of flour the vendor agreed to ship the same during the month of November, but in fact shipped but three carloads during that month, six carloads of the remainder being shipped during December and one in January, in an action by the vendor to recover damages caused by the refusal of the vendees to accept the December and January shipments, evidence that during the latter part of November the agent of the vendees in a conversation with the agent of the vendor requested that the latter write to his principal and ascertain "if it would suit him just as well to have that flour distributed through December as to have it all come the latter part of the month," and upon the vendor's agent consenting to so write, further said, "string it along through December," and that during a subsequent conversation between them the vendees' agent asked if the vendor had been written to with reference to distributing their December flour, to which the vendor's agent replied that he thought they had written, together with evidence that the shipments were actually strung along through December as suggested, that an invoice was sent to the vendees as each car was shipped, sight drafts drawn upon them for the purchase price and they were informed of the arrival of the cars at their destination, is sufficient to support a finding that as to the December shipments the provision of the contract requiring delivery in November had been waived, where, so far as appears, the invoices were retained by the vendees without objection and no intention of rejecting the goods was manifested by them until the middle of January. *Birkett* v. *Nichols.* 315

3. *Charter Party — When Charterers, Not Owners, Are Liable for Loss of Goods Resulting from Alleged Negligence in Unloading Goods.* Where a charter party gives to the charterers of a steamship the absolute right of selecting the dock, wharf or place for the discharge of the cargo with which the steamship is laden, provided only that the steamer shall always lie safely afloat at any tide, the charterers to indemnify the owner from all consequences or liabilities that might arise from the signing of bills of lading, the owner is not liable for the value of goods destroyed by the collapse of a pier as the result of the alleged negligence of the charterers in failing to exercise reasonable care and diligence in selecting a suitable place in which to unload and deposit the goods. *Rosenstein* v. *Vogemann.* 325

4. *Common-law Rule as to Notice to Consignee — When It is Not Avoided by Provisions of Bill of Lading.* The common-law rule that where the contract is to carry goods by water from port to port, the carrier is liable until the goods have been actually delivered or notice of the time and place of arrival of the vessel given to the consignee and a reasonable

CONTRACT — *Continued.*

time thereafter allowed for the removal of the goods, is not avoided by a provision in a bill of lading, "Goods to be taken from the ship by the consignee directly they come to hand in discharging the ship and the carrier's responsibility to cease package by package immediately the goods leave the ship's deck or tackle. If not taken from alongside by the consignee they will be landed and deposited at the expense of the consignee and at his risk of fire, loss or injury on the dock or in the warehouse or in craft," where the bill of lading is silent upon the question of notice; since in so far as the contract is ambiguous or leaves the intention of the parties in doubt, it must be construed against the carrier. *Id.*

5. *When Notice to Consignee Is Insufficient — Liability of Carrier for Loss of Goods Caused by Collapse of Pier.* Where it appears, in an action brought for the value of goods carried under such bill of lading from a foreign port to a consignee in the city of New York and destroyed by the collapse of a pier upon which they were unloaded, that they were transported by a freight steamship having no pier or dock of her own, and no schedule or fixed time of arrival, so that the consignee could not estimate or determine with reasonable certainty the day on which she would arrive or at what pier or wharf she would find a berth; that the steamship was berthed at a Staten Island pier about noon of a certain day; that the consignee received notice of that fact from the owners of the pier between two and three o'clock of the same day; that the unloading of the goods was concluded on the following day, they being placed upon the pier, and that at about five o'clock of that day the pier collapsed and the goods were precipitated into the water and thereby rendered valueless, the evidence justifies a finding that sufficient notice of the arrival of the steamship, and reasonable time to appear at the pier and take charge of the freight, was not given to the consignee, so that the carriers were not relieved, under the circumstances, of their liability as common carriers by a discharge of the goods upon the pier; and such liability is not dependent upon the question whether they were guilty of negligence in having failed to exercise reasonable care in selecting a safe place to unload. *Id.*

6. *Sales — Agreement to Pay More on Favorable Test of Article — Measure of Damages.* Under a contract of sale of an electric plant at a specified price, containing a stipulation that if the vendor's system of storage battery cars, under a test agreed to be made by the vendee and the conditions of which were thereafter to be, and were agreed upon, should equal or prove superior to the system proposed to be operated by the latter, it would pay specified additional sums based upon the equality or different percentages of superiority, where the vendee refuses to make any test, in the absence of any proof showing that the vendor's system was equal or superior to the other, it is not entitled to the largest or any of the additional sums specified in case of a favorable result of a test, as damages for the breach, but to nominal damages only. *Hopedale Electric Co.* v. *Electric Storage Battery Co.* 356

Limitation in passage ticket as to liability for loss of baggage.

See CARRIERS.

Failure to deliver installments as agreed a breach of entire contract.

See ESTOPPEL.

Of employment, by which employer is relieved from liability for negligence, void as against public policy

See MASTER AND SERVANT.

Of employment as school teacher — when refusal to comply with regulation forfeits salary.

See SCHOOLS, 3.

CONVERSION.

1. *Sale of Securities by Stockbroker Without Notice of Time or Place.* Where a stockbroker buys securities for a customer, although he advances the whole amount necessary for the purchase, instead of requiring a margin, the relation of pledgee and pledgor exists between the parties; and a sale of the securities by the broker, without notice of the time and place of sale, constitutes a conversion, in the absence of an agreement dispensing with such notice or providing for otherwise disposing of them. *Content* v. *Banner*. 121

2. *Insufficient Notice.* A written notice to take up securities bought under such circumstances, or to supply sufficient margin to carry them, stating that unless the customer made suitable arrangements "before Wednesday next (August 13) we shall sell this stock for your account and hold you responsible for the loss," is defective in that it contains no proper statement as to the time or place of sale; and in the absence of any agreement dispensing with such notice, a sale "on the curb," the customer having failed to respond on the day specified, constitutes a conversion. *Id.*

Of oysters.

See OYSTERS AND SHELL-FISH, 1, 2.

CORPORATIONS.

1. *Stockholder's Action — Stockholder Cannot Complain of Alleged Ultra Vires Acts After He Has Taken Benefits Thereunder.* Where the objection to the acts or plans of a corporation is that they are *ultra vires*, without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an equitable action in his own behalf, based on such objection, to restrain the corporation from carrying out such acts, or plans, and to have the same set aside as illegal and void, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder; and such a defense is available notwithstanding the fact that the plaintiff did not receive such pecuniary benefits until after the commencement of the action *Wormser* v. *Metr. Street Ry. Co.* 83

2. *Insurance — Statutory Stipulations Required of Foreign Corporations as a Condition of Doing Business in a State Are for the Benefit of Those Only Who Contract in Reliance Thereon.* A statute requiring a foreign insurance company, as a condition of doing business in a state, to execute a power of attorney authorizing the state insurance commissioner to represent it as to the service of process in all proceedings against it therein, which shall be "irrevocable so long as any liability of the company remains outstanding" in the state, is primarily designed for the protection of those citizens of the state who in reliance thereon acquire rights under policies executed with them or for their benefit while they are citizens; it does not create and perpetuate a local forum to which, under the guise of an assignment to a citizen, non-residents may resort for the purpose of instituting litigation upon contracts issued to them at their homes, which by no possibility can be regarded as having been made in reliance upon such provision, against a corporation subject to service at their homes and which prior thereto has attempted in good faith to withdraw from the state resorted to. *Hunter* v. *Mut. Reserve L. Ins. Co.* 136

3. *Effective Revocation, as to Non-residents, of Power of Attorney Authorizing Service of Process upon State Insurance Commissioner.* Where a foreign insurance company, owing to adverse legislation, serves upon such insurance commissioner a written notice withdrawing from the transaction of business in the state and revoking such power of attorney, and thereafter does no business therein, except that premiums and losses on policies theretofore issued to residents of the state were remitted to and from the home office by mail, and in four specific instances, three of which involved the settlement of losses under or a re-adjustment of such poli-

cies, and in the fourth a special adjuster, appointed to settle a claim with a supposed non-resident, followed him for such purpose into the state in question into which he had removed, the revocation of the power of attorney is effective as against non-residents who, having taken out policies in their own states, after such revocation, assigned claims against the company arising therefrom to residents of the state for the purpose of placing them in judgment therein; since under such circumstances the company cannot be regarded as having continued the ordinary, substantial and active business in the state necessary to keep alive its power of attorney as to such parties. *Id.*

4. *When Power of Attorney, Irrevocable on Its Face, May Be Revoked.* Nor does the statutory provision as to the irrevocability of the power of attorney prevent its effective revocation as to such non-residents and permit the subsequent prosecution by their assignees of such claims by service upon the insurance commissioner; since a power of attorney, although literally irrevocable, may be revoked unless some interest or right founded or created upon the faith thereof requires its perpetuation and continuance, and by no possibility can such claims be regarded as having been contracted or acquired in reliance thereon; judgments, therefore, based upon such service in actions upon the claims, are void and of no effect. *Id.*

5. *Stockholders' Action — When Demand That Corporation Bring Action Unnecessary.* Where in a stockholders' action the defendants against whom the wrong is charged are the executive officers of the corporation, who also constitute a majority of the acting board of directors, a prior demand upon the corporation to bring the action is unnecessary. *Jacobson v. Brooklyn Lumber Co.* 152

6. *Action of Board of Directors Voidable Where Majority of Board Are Personally Interested — Prosperity of Corporation No Defense.* In an action brought by minority stockholders of a corporation to recover for the corporation from the president and vice-president and treasurer thereof amounts received by such officers by reason of increases in their salaries alleged to have been improperly authorized by the board of directors, and to cancel alleged improper resolutions of said board purporting to authorize such officers to credit themselves with certain amounts for deferred salaries, admissions in the pleadings and findings of fact to the effect that the said officers had since the organization of the corporation been the owners of a majority of the stock; that at the time of and previous to the alleged improper actions by the board of directors they were members thereof and constituted a majority of the membership of said board, the plaintiffs having no representation therein; that the increases in the salaries of said officers were voted by themselves, but that such increases were legitimate and commensurate with the increase in business and resulting profits, they having devoted all of their time to the business, extended it and placed the corporation on a sound basis, and that through their efforts the stock held by the plaintiffs had increased in value, do not justify the conclusion of law that the complaint should be dismissed; since the relation of said officers to the corporation was fiduciary and they could not make an agreement with themselves acting on the one part individually and for their own benefit and on the other part in their fiduciary capacity; and if, through their acts, a loss has been wrongfully occasioned to the corporation, it is neither a defense nor a mitigating circumstance that despite their illegal acts the corporation is still solvent or that its stock has increased in value. *Id.*

7. *Business Corporations — Construction of Provisions in Charter and Certificates Relating to Dividends on Preferred Stock.* Where the charter of a business corporation and the certificates issued to holders of preferred stock provide that such stock shall be entitled to dividends, at a

CORPORATIONS — *Continued.*

specified rate, out of the surplus profits arising from the business, before any dividend be paid on the common stock, and that such dividends shall be cumulative and in case of non-payment shall bear interest at a fixed rate from the date when payable, such provision constitutes a valid contract between the company and the preferred stockholders, which is binding upon all other stockholders. *Roberts* v. *Roberts-Wicks Co.* 257

8. *Reduction of Capital Stock While Company Is in Default of Dividends on Preferred Stock — Rights of Preferred Stockholders.* The fact that such corporation, having failed to pay any dividends on its preferred stock for three years, reduced its capital stock under the statute (Stock Corporation Law [L. 1890, ch. 564], § 44, as amd. by L. 1892, ch. 688), giving to its stockholders their proportionate number of shares in exchange for their former holdings, does not affect the rights of the preferred stockholders as to previous arrears of dividends; as a result of such reduction, the preferred stockholders have a less number of shares, but, as between themselves and the other stockholders, they are still creditors for the arrears of dividends due from the company on the shares of preferred stock which they had previously held, and are entitled to be paid such arrears, with the stipulated interest thereon, before any of the surplus profits can be appropriated to a dividend upon the common stock. *Id.*

9. *Resolution of Board of Directors Directing Payment of Arrears of Dividends on Reduced Preferred Stock and Also on Common Stock.* A subsequent resolution of the board of directors, adopted after such corporation had accumulated a surplus of profits directing the payment of the amount due to the preferred stockholders in full of dividends upon their reduced stock, with interest thereon from the time the last dividend had been paid and also declaring a dividend on the common stock, is invalid and cannot be sustained; it was the duty of the directors in dividing the surplus profits to apply them, in first order, to the satisfaction of the debt to the preferred stockholders for the arrears of dividends on the whole number of their shares outstanding during the three years prior to the reduction of the capital stock, with the stipulated interest accrued thereon. *Id.*

10. *Reduction of Capital Stock — Surplus Created Thereby Cannot Be Applied upon Arrears of Dividends Due to Preferred Stockholders.* The preferred stockholders have, however, no right to any surplus created by the reduction of capital stock; such surplus cannot be regarded as "surplus profits arising from the business of the corporation," since it is not within the intendment of the agreement with respect to dividends on the preferred stock, and its distribution, when made, can only be legally effected by dividing it among all the stockholders ratably and without preference, so that it is not applicable to the claim of the preferred stockholders for the arrears of unpaid dividends. *Id.*

Stockholder's action — allegations necessary — demand that corporation bring action.

See PLEADING, 2–4.

Foreign, doing business within the state — when bills receivable for goods sold in original packages are taxable as capital employed within this state.

See TAX, 1.

COURT OF APPEALS.

Will examine pleadings to ascertain what facts are admitted.

See APPEAL, 1.

Order denying motion to quash indictment reviewable by.

See CRIMES, 2.

CRIMES.

1. *Writ of Prohibition.* A writ of prohibition lies only where the grievance cannot be redressed by ordinary proceedings at law or in equity or by appeal. *People ex rel. Hummel* v. *Trial Term.* 30

2. *Order Denying Motion to Quash Indictment Appealable — Code Cr. Pro.* §§ 485, 517. A motion to dismiss an indictment although not specifically mentioned in section 485 of the Code of Criminal Procedure, is embraced in the general provisions thereof and is included in and becomes a part of the judgment roll; an order of the trial judge denying such a motion, made upon the ground that the defendant had been compelled to testify against himself before the grand jury, is under section 517 reviewable by the Appellate Division, and under section 519, subdivision 3, by the Court of Appeals; the defendant, therefore, having a complete remedy by appeal, is not entitled to a writ prohibiting the judge from further proceeding with the trial. *Id.*

3. *Murder — Erroneous Instructions as to Killing After the Commission of a Burglary Had Ceased — Penal Code,* § 183. Where it appears upon the trial of a defendant indicted for murder in the first degree for killing a police officer, who was attempting to arrest him, that defendant, while attempting to commit a burglary was discovered by a private watchman; that, abandoning the property which he had stolen, he ran from the building pursued by the watchman until they were seen by a policeman who took up the pursuit, calling upon defendant to stop or he would shoot; that after following him for about three hundred feet the policeman had so gained upon the defendant that he was but a few feet distant from him when the latter suddenly drew his revolver and shot the policeman, producing a wound from which he died, it is reversible error to instruct the jury that in case the defendant did not intend to kill the policeman and that the killing was without premeditation, yet if they found that he fired the shot at the policeman after he had attempted to burglarize or had burglarized the premises described in the indictment and was attempting to escape therefrom, then the verdict ought to be for murder in the first degree; since, at the time of the killing the defendant had ceased to be engaged in the commission of a burglary. (Penal Code, § 183.) *People* v. *Hüter.* 237

4. *Murder as in the Commission of a Felony — Penal Code,* § 218, *Subd.* 5. Nor is a conviction for murder in the first degree, as in the commission of a felony, warranted by the fact that at the time of the killing the defendant was engaged in the commission of another felony, *i. e.*, an assault upon an officer to prevent or resist the apprehension of himself (Penal Code, § 218, subd. 5); since the assault being the gist of the offense becomes a constituent part of and is merged in the homicide, and cannot be regarded as a separate and independent felony, which although committed "without a design to effect death," would bring the case within the statute. *Id.*

CURTESY.

Tenancy by.

See REAL PROPERTY, 1.

DAMAGES.

Measure of.

See CONTRACT, 6.

Measure of — in condemnation proceedings.

See EMINENT DOMAIN, 2, 3.

For injury to enjoyment and occupation of leased premises — tenant, not landlord, may recover.

See NUISANCE.

DAMAGES — *Continued.*

Measure of, in action to recover for false representations made to induce purchase of real property.

See VENDOR AND PURCHASER, 1–3.

DECEDENT'S ESTATE.

Enforcement of creditor's lien against insurance moneys.

See JURISDICTION, 1, 2.

Aliens — escheat.

See REAL PROPERTY, 10–12, 13.

Transfer tax.

See TAX, 2, 3.

When life estate will not be converted into absolute estate in favor of same person by clause of doubtful meaning.

See WILL, 5.

DEEDS.

Partition — boundaries and description of land abutting on a street or highway — when title to center is conveyed.

See REAL PROPERTY, 3–5.

DEMURRER.

Defect in parties defendant — improper joinder of causes of action.

See PLEADING, 1, 3.

DENIAL.

Should be clear and specific.

See PLEADING, 5.

DESCENT.

Statutes of, require ancestor to be possessed of some inheritable title — escheat.

See REAL PROPERTY, 10–12.

When aliens cannot inherit.

See REAL PROPERTY, 13.

DIRECTORS.

Of corporation — action of, voidable where majority of board are personally interested.

See CORPORATIONS, 6.

DIVIDENDS.

Rights of preferred stockholders where capital stock is reduced while company is in default of dividends on preferred stock.

See CORPORATIONS, 7–10.

DOMESTIC RELATIONS.

Enforcement, under section 22 of Domestic Relations Law, of creditors' lien against insurance moneys.

See JURISDICTION, 1, 2.

EASEMENTS.

1. *Although Reserved, Pass With Conveyance of Freehold.* Easements of light, air and access, appurtenant to real property abutting on a public street or highway, are inseparable from the dominant estate, and upon a conveyance of the latter such easements pass to the grantee, notwithstanding the grantor's attempted reservation of the same or of any rights

EASEMENTS — *Continued.*

of action for the invasion or destruction thereof. *McKenna* v. *Brooklyn Union El. R. R. Co.* 391

2. *Effect of Reservation Is to Make Grantee the Trustee of Moneys Received for Subsequent Conveyance.* Although such reservation in a deed is ineffectual to create a trust in such easements, it does create a resulting trust by virtue of which the grantee becomes a trustee for his grantor as to all moneys received or judgments recovered for the invasion or destruction of such easements. *Id.*

3. *Grantee Alone Can Sue for Damages or Execute Release.* The owner of premises as to which such easements have been destroyed is the only person who can sue for the damages thus caused or who can execute a release in satisfaction thereof, and, therefore, a person or corporation invading or destroying such easements has the right to obtain a release from the owner of the dominant estate who alone is legally entitled to the resulting damages. *Id.*

4. *Action by Grantor to Set Aside Subsequent Conveyance and to Recover Damages for Invasion or Destruction of Easements.* Where the abutting owner of property injuriously affected by the operation and maintenance of an elevated railroad brings the usual action for damages and, during its pendency, conveys the property, reserving, however, his easements and the right of action therefor, and subsequently the railroad company, with knowledge of such reservation, obtains from his grantee a release of the easements and of any right of action relating thereto, for a stipulated sum, and thereafter the former owner brings an action against the company and his grantee, demanding that the latter be declared a trustee for his benefit and that the release be declared void and set aside, a judgment reversing a decision of the trial court dismissing the complaint as to the company, apparently based upon the theory that the reservation in plaintiff's deed was effectual to create an equitable lien upon the easements which was binding upon the company, is erroneous, since there can be no lien upon such easements, separate and apart from the freehold to which they are appurtenant; the reservation created an equitable lien in favor of plaintiff as against his grantee, upon the moneys received as a consideration for the release and nothing more, and in the absence of any allegation or proof of fraud or insufficiency of consideration, the amount received is conclusive as between them. *Id.*

ELEVATED RAILROADS.

Action against, for damages to easements of abutting property.

See EASEMENTS, 1–4.

EMINENT DOMAIN.

1. *Villages — Water Works — Reservoir Constructed upon Land Before Condemnation Proceedings Are Had and Compensation Awarded to Owner, Constitutes a Trespass.* Where the authorities of a village, not only without the consent of the owner, but against his express command and remonstrance, entered upon his lands and constructed thereon an intake or reservoir for the village water works and laid pipes for conducting water to and from the reservoir, before instituting condemnation proceedings, such entry and invasion is clearly tortious, the village and its agents being mere trespassers, notwithstanding a survey had been made and a map of the land and water rights proposed to be taken had been filed under the statute then in force (L. 1875, ch. 181, § 5, as amd. by L. 1885, ch. 211 and L. 1895, ch. 383); since the mere making and filing of the map did not empower the village to take possession of the premises described therein and erect a water plant thereon; it is only after condemnation proceedings have been had and confirmed by the Supreme Court and the compensation awarded to the landowner has been paid or deposited in court, that the village becomes entitled to take and

EMINENT DOMAIN — *Continued.*

hold the property (L. 1875, ch. 181, § 6, subd. 8, as amd. by L. 1885, ch. 211); the only entry which the statute authorizes to be made before condemnation is "for the purpose of making surveys and to agree with the owner" as to the amount of compensation. (L. 1875, ch. 181, § 4, as amd. by L. 1885, ch. 211, and L. 1895, ch. 383.) *Village of St. Johnsville* v. *Smith.* 341

2. *Same — Award to Owner, Made After Construction of Reservoir, Should Include Value of Construction and Work Placed upon Land.* Where condemnation proceedings were subsequently instituted and an award was made to the owner for the land and water rights taken by the village, in which the commissioners of appraisal expressly declared that, in making the award, they made no allowance "for the value of the pipe, the intake basin or the superstructure covering the same nor for any of the work or construction placed upon the appraised premises * * *, or for any enhanced value of the premises by reason of such construction having been placed thereon," such award is erroneous, since the landowner is entitled to have the value of the structures placed upon his premises by the village, without authority of law, before the institution of the condemnation proceedings, considered by the commissioners of appraisal in arriving at their determination as to the compensation which ought justly to be made to him by reason of the taking of his lands. *Id.*

3. *Same — Rule for Ascertaining Measure of Compensation.* In ascertaining the compensation to be awarded, the measure of such compensation is neither the cost of the improvements nor their value or the value of their use to the village; the true inquiry is how much do the improvements placed upon the property enhance the value of the owner's land. *Id.*

ENCROACHMENTS.

On real property — liability for result when unintentional.

See TRESPASS.

EQUITY.

Foreclosure of chattel mortgage.

See MORTGAGE, 1.

When court upon denial of equitable relief may retain jurisdiction and determine whether damages should be awarded.

See PRACTICE, 1.

ESCHEAT.

Failure to file declaration of citizenship by alien heir — insufficiency of statutes relied upon as waiving right of escheat — statutes of descent require ancestor to be possessed of some inheritable title.

See REAL PROPERTY, 10–12.

ESTATES.

Enforcement of creditor's lien against insurance moneys.

See JURISDICTION, 1, 2.

By curtesy.

See REAL PROPERTY, 1.

Aliens — escheat.

See REAL PROPERTY, 10–12, 18.

Transfer tax upon.

See TAX, 2, 3.

When life estate will not be converted into absolute estate in favor of same person by clause in will of doubtful meaning.

See WILL, 5.

ESTOPPEL.

Sale — Failure to Deliver Installments as Agreed, a Breach of Entire Contract — Damages Recoverable in One, Not Successive Actions. Where the vendor of goods to be delivered and paid for in installments, refuses to deliver an installment, a breach of the entire contract is thereby established for which the vendee if he so elects may immediately recover all his damages; or he may wait until the expiration of the time for the delivery of all the goods and then recover; he cannot, however, split up his demand and maintain successive actions to recover for each default as it occurs; and when he obtains a judgment for damages for the non-delivery of part of the goods, it is a bar to the maintenance of a subsequent action to recover for the failure to deliver the balance. *Pakas* v. *Hollingshead.* 211

EVIDENCE.

Erroneous Exclusion on Cross-examination of Questions Affecting Credibility of Witnesses. Where in an action to enforce a fraternal insurance certificate, the principal issues litigated were first, as to whether answers to questions in the application relating to the assured's use of intoxicating liquors were made by him or were written in without his knowledge or consent by the medical examiner; second, if made by the assured, whether they were true, and there is evidence that he was an habitual user of intoxicating liquors; that he had been convicted of public intoxication and had been confined in the penitentiary therefor; the refusal of the trial court to permit the plaintiff, who had sworn that the answers were made without the knowledge or consent of the assured and that she had never seen him intoxicated, to testify on cross-examination as to whether she had seen him in the penitentiary, constitutes reversible error; the exclusion, also, on cross-examination, of a question to plaintiff's son who had testified that he had known the assured all his life and had never seen him intoxicated, as to whether he had not talked with her about having a complaint made against the assured for intoxication, constitutes reversible error; both questions materially affected the credibility of the witnesses and should not have been excluded. *Rossenbach* v. *Order of Foresters.* 92

Tending to show breach of warranty — erroneous exclusion of.

See INSURANCE, 4.

Credibility of witness, a question of fact.

See NEGLIGENCE, 4.

Immaterial, in transfer tax proceeding.

See TAX, 3.

Erroneous exclusion of evidence tending to show that false representation caused no damage.

See VENDOR AND PURCHASER, 2, 3.

Mental incapacity of testatrix — erroneous admission of evidence relating to mental disease of relatives — erroneous refusal to strike out answer of lay witness as an opinion — admissions of executor and legatee incompetent as evidence against other legatees.

See WILL, 1–4.

EXCISE.

Liquor Tax Law — When Rear Door of a City Dwelling Is Not an "Entrance" Within Meaning of Section 17, Subd. 8. A rear door of a city dwelling, leading to the back yard thereof and inaccessible to anybody desiring to pass from the street, or other point outside of the dwelling into the latter, is not an "entrance" within the meaning of the statute (Liquor Tax Law [L. 1896, ch. 112], § 17, subd. 8) requiring the consent of at least two-thirds of the owners of dwelling houses within 200

EXCISE — *Continued.*

fect of a proposed saloon, such distance to be "measured in a straight line of the nearest entrance to a building or buildings occupied exclusively for a dwelling." *McDougal* v. *Malaghan.* 253

FALSE REPRESENTATIONS.

Made to induce purchase of real property — measure of damages.

See VENDOR AND PURCHASER, 1-3.

FIRE INSURANCE.

No recovery for loss of property held as bailee where the latter is not responsible to owner.

See INSURANCE, 1.

Breach of warranty as to one subject of insurance does not affect policy as to the other subjects — when warranties in application and policy have same effect.

See INSURANCE, 2-4.

FISH AND GAME.

Provision of Forest, Fish and Game Law prohibiting possession of game during close season constitutional — power of Congress to authorize enactment of state law prohibiting importation and possession of foreign game during close season.

See CONSTITUTIONAL LAW, 1, 2.

FORECLOSURE.

Of chattel mortgage.

See MORTGAGE, 1.

Right of wife to redeem land sold in action to which she was not a party.

See MORTGAGE, 2-4.

FORMER ADJUDICATION.

Failure to deliver installments of goods sold, as agreed, a breach of entire contract — damages recoverable in one, not successive actions.

See ESTOPPEL.

When judgment in action of partition is *res adjudicata* as to parties thereto.

See REAL PROPERTY, 7.

FRANCHISE.

In land under water for cultivation of shellfish — conditions of grant precedent, not subsequent.

See OYSTERS AND SHELL-FISH, 1, 2.

GAME.

Statute prohibiting possession during close season constitutional.

See CONSTITUTIONAL LAW, 1, 2.

GRANTS.

Of lands under water for cultivation of shellfish — conditions of, precedent, not subsequent.

See OYSTERS AND SHELL-FISH, 1, 2.

HIGHWAYS.

Ownership of fee of roadbed.

See REAL PROPERTY, 2-5.

HUSBAND AND WIFE.
Right of wife to redeem land sold in foreclosure action to which she was not a party.
See MORTGAGE, 2–4.

Tenancy by curtesy.
See REAL PROPERTY, 1.

INFANTS.
Service of summons on infants residing out of state.
See REAL PROPERTY, 9.

INJUNCTION.
1. *Authority of Court to Grant.* A court of equity has no inherent absolute power to grant interlocutory injunctions — that authority must be found in the Code of Civil Procedure. *Bachman* v. *Harrington.* 458

2. *Mandatory Injunction — Code Civ. Pro.* §§ 603, 604. While under the Code of Civil Procedure it is within the power of a court of equity, in proper cases, to issue mandatory injunctions, such power is not unlimited, and when the exercise of such power exceeds the limit, it is not a mere error, but void as without jurisdiction. *Id.*

3. *Same.* Where the complaint presents a case showing or tending to show that affirmative action by the defendant of a temporary character is necessary to preserve the status of the parties, then a mandatory injunction may be granted; but if there be neither proof nor allegation to that effect, and the act sought to be enforced is not continuous in its character, but solely the one sought to be decreed by final judgment, then the issuing of a preliminary mandatory injunction is without authority. *Id.*

4. *Violation of Void Order Not Punishable as for a Civil Contempt.* Where the main object of an action by a suspended member of a voluntary association is to compel his reinstatement as a member in good standing, the court has no power to grant an interlocutory injunction requiring his reinstatement; and in a proceeding to punish as for a civil contempt the violation of such injunction, the lack of authority to grant it is a complete defense. *Id.*

INSURANCE.
1. *Fire — No Recovery for Loss of Property Held as Bailee Where the Latter Is Not Responsible to Owner.* After insuring as the absolute owner a stock of glass then on hand, under a policy covering "his own or held by him in trust, or sold but not delivered, for which he may be held liable," the insured sold and delivered the glass, agreeing also that all glass to be manufactured by it within a specified time should become the property of the vendee as soon as manufactured, and should be subject to the latter's orders as to shipment; in the meantime it should be stored in the warehouses of the insured, which were leased to the vendee for that purpose; the insured assumed the responsibility for any loss or damage except "loss by fire," and "said glass" was to be insured by the vendee, the former, however, agreeing to pay the premiums; thereafter the property was destroyed by fire. In an action upon the policy by an assignee of the insured, *held*, that the vendee was vested with the title and entire insurable interest in the property in case of loss by fire, and that it was its duty to take out the policy in its name, the insured paying the premiums; that the fact that the latter was the custodian or caretaker of the property did not establish that it was held "in trust" within the meaning of the policy, for the reason that those words apply only to those cases of bailment where the bailee is responsible to the owner, while here the insured was expressly relieved from any responsibility in case of fire, and, therefore, the plaintiff could not recover. *Burke* v. *Continental Ins. Co.* 77

INSURANCE — *Continued.*

2. *Fire — Breach of Warranty as to One Subject of Insurance Does Not Affect Policy as to the Other Subjects.* Where by the same policy of fire insurance, different classes of property, each separately valued, are insured for distinct amounts, even if the premium for the aggregate amount is paid in gross, the contract is severable and a breach of warranty as to one subject of insurance only does not affect the policy as to the others, unless it clearly appears that such was the intention. *Donley* v. *Glens Falls Ins. Co.* 107

3. *When Warranties in Application and Policy Have Same Effect.* Where the application for insurance provides that the statements contained therein are made "a special warranty, the same as if written on the face of the policy," an intention is indicated that they should have the same effect only. *Id.*

4. *Erroneous Exclusion of Evidence Tending to Show Breach of Express Warranty.* A statement in such an application that the insured has no reason to fear incendiarism constitutes an express warranty to that effect, even if that fact were not material to the risk, and if untrue, renders the policy void. Evidence, therefore, in an action upon the policy, that several fires had occurred on farms belonging to the wife of the insured and managed by him, that he had stated previous to making the application that the fires were of incendiary origin and that some of them were set by his enemies because of a grudge against him, is competent and material as tending to show the falsity of such statement and its exclusion constitutes reversible error. *Id.*

5. *Life — Breach of Warranty — False Statements to Medical Examiner as to Health of Insured — Insurance Company Not Bound by True Statements Made to Soliciting Agent.* The fact that the insured disclosed to the soliciting agent of a life insurance company the true state of his health and physical condition before going to the medical examiner is not a good reply in an action brought on the policy issued to him, to the defense of a breach of warranty, in that statements made by him to the medical examiner were false; especially where it appears from the application that the only information to be obtained by the agent related to the occupation, age, place of birth and other insurance; and that inquiries as to the health of the insured, his previous or existing ailments, former attention by physicians and similar matters were exclusively within the domain of the medical examiner and were wholly beyond the scope of the solicitor's duties or functions; so that notice or information as to the health or physical condition of the insured given to the soliciting agent could not bind the company. *Butler* v. *Mich. Mut. L. Ins. Co.* 337

Statutory stipulations required of foreign corporations as a condition of doing business in a state are for the benefit of those only who contract in reliance thereon — effective revocation.

See CORPORATIONS, 2–4.

Fraternal — mis-statements in application.

See EVIDENCE.

Enforcement of creditor's lien against insurance moneys.

See JURISDICTION, 1, 2.

JURISDICTION.

1. *Surrogate Has No Jurisdiction to Enforce Creditor's Lien against Insurance Moneys under Section 22, Domestic Relations Law — Code Civ. Pro.* §§ 2472, 2481, 2596, 2712, 2731. A surrogate has only such jurisdiction as is expressly or by necessary implication conferred by statute.

JURISDICTION — *Continued.*

While the tendency of recent legislation has been to enlarge his powers, he has not yet been given the broad powers of a court of equity which are necessary to enforce a creditor's lien upon the proceeds of a policy of insurance issued on the life of a husband in which the wife was named as the beneficiary and the annual premium on which was in excess of $500, and to determine, in a proceeding by a creditor of the estate to compel her as executrix to account, whether as between her individually and the creditors of her deceased husband any part of such proceeds is chargeable with a lien in favor of his creditors under the Domestic Relations Law (L. 1896, ch. 272, § 22). The Code of Civil Procedure (§§ 2472, 2481, 2596, 2712, 2731) confers no such jurisdiction either expressly or impliedly; the amount of insurance purchased by the excess of premiums does not belong to the husband in his lifetime and forms no part of his estate after his death even as to creditors; the premiums paid do not constitute a debt against his wife in favor of himself or his estate; the proceeds are not assets and cannot be included in the inventory; they are liable "primarily" for his debts solely by force of the statute; they constitute a separate fund, devoted exclusively to the payment of the deficiency arising after all the assets of the estate have been applied upon the debts, while the surplus, if any, is to be returned to the widow. The phrase "property alleged to belong to the estate," as used in section 2731 of the Code, means property which is "deemed assets" as defined in section 2712, and which may be inventoried under section 2714. An allegation in the petition, therefore, that the insurance moneys were property of the estate, gives the surrogate no jurisdiction to try the question of title or enforce the lien any more than if a similar allegation had been made with reference to the title to real estate or other matters over which the surrogate has no jurisdiction. *Matter of Thompson.* 36

2. *Procedure to Enforce Lien.* The orderly course of procedure in such a case is by a representative action to establish and enforce the lien after the assets of the estate have been exhausted and the amount required to pay the remainder of the husband's debts has been established by a surrogate's decree, and in such an action distribution may be made and circuity thus avoided. *Id.*

Of court of equity to grant injunction.

See INJUNCTION, 1–4.

Foreclosure of chattel mortgage.

See MORTGAGE.

Of police commissioner of city of New York to order retirement of policeman for disability.

See NEW YORK (CITY OF), 3.

When court upon denial of equitable relief may retain jurisdiction and determine whether damages should be awarded.

See PRACTICE, 1.

JUSTICE'S COURT.

When writ of prohibition will not issue to restrain prosecution of action in Justice's Court.

See PROHIBITION, 2.

LANDLORD AND TENANT.

Injury to enjoyment and occupation of leased premises — tenant, not landlord, may recover damages.

See NUISANCE.

LEGISLATURE.
Constitutional requirement as to passage of laws.
See TAX, 4.

LIBEL.
Defamatory Statements as to Certain Class of Public Officials — Action by One of Such Persons to Recover Damages — Demurrer. Where an article, published in a newspaper at the time of the criminal conviction of a coroner of the city of New York, detailed with great particularity the manner in which unlawful and iniquitous practices were employed in the office of coroner to secure illegal gains, more than once specifically mentioned the coroners' physicians as employing these means, stated that the criminal practices pervaded "the entire office," but that "most of the graft goes, not to the underlings, but to those higher up," it cannot be said as matter of law that such language was employed in criticism of some body or class or in relation to general conditions, and that it had no personal and individual application or significance; and a demurrer to the complaint in an action of libel, by a coroner's physician in office at the time of the publication of such article, alleging that it was published of and concerning the plaintiff as such physician, and demanding damages therefor upon the ground of failure to state a cause of action, is properly overruled. *Weston* v. *Commercial Advertiser Assn.* 479

LIENS.
Enforcement of creditor's lien against insurance moneys.
See JURISDICTION, 1, 2.

LIQUOR TAX LAW.
When rear door of a city dwelling is not an "entrance" within meaning of statute.
See EXCISE.

MALICIOUS PROSECUTION.
When Probable Cause a Question of Law. Where in an action to recover damages for malicious prosecution, the undisputed facts establish that the defendants were without malice and that after an investigation, which was cautious and painstaking in the extreme, they possessed knowledge of actual facts and acquired reliable information of apparent facts which fully justified them in instituting criminal proceedings, and in addition they received and must be assumed to have relied upon the advice of learned counsel including the district attorney, it must be held as a matter of law that the defendants were not guilty of malicious prosecution; and a judgment affirming a judgment in favor of plaintiff, entered upon a verdict, must be reversed. *Lawson* v. *Leggett.* 504

MALPRACTICE.
By attorney.
See CHAMPERTY, 2.

MASTER AND SERVANT.
Agreement Relieving Employer From Liability for Negligence Resulting in Personal Injuries, Void as Against Public Policy. An agreement relieving an express company from liability to an employee for personal injuries resulting from the negligence of the company, which he may receive in the course of his employment, is void as against public policy, in that its enforcement would nullify the strict and just rule of the common law imposing the duty of care on the part of employers toward employees, which in the interests of the public should be maintained and enforced. *Johnston* v. *Fargo.* 379

No immunity from liability for acts of servant because he is also a public officer.
See NEGLIGENCE, 2–4.

MASTER AND SERVANT — *Continued.*

When contractual relations between, will prevent recovery for personal injuries.

See NEGLIGENCE, 8.

Safety of working place — assumption of risk.

See NEGLIGENCE, 11.

MISJOINDER.

Improper joinder of causes of action.

See PLEADING, 8.

MISTAKE.

Of law.

See RAILROADS, 1, 2.

MORTGAGE.

1. *Foreclosure of Chattel Mortgage — Remedy — Jurisdiction — New Trial.* A suit in equity to foreclose a chattel mortgage is proper whenever the legal remedy of the holder of the mortgage is inadequate; and in such a suit the form of pleading, mode of procedure and jurisdiction of the court are the same as in an action to foreclose a mortgage upon real property. The general rule that there can be no litigation of title paramount or hostile to the mortgage does not preclude the court from deciding the question whether an asserted title is in fact paramount or hostile in a case where that is one of the issues presented by the pleadings. Where a title, asserted as paramount and hostile to that of the mortgagee, is in fact not so, and the latter recovers judgment, it is error for the Appellate Division to attempt to modify the judgment by dismissing the complaint absolutely in favor of the defendant raising that issue, particularly when such defendant also contends that some of the chattels claimed by the mortgagee were delivered to the mortgagor after the execution of the mortgage, and the insufficiency of the evidence upon that issue, which may be changed on another trial, is the basis of the modification. In such a case there should be a direction for a new trial, and the defendant making the allegations is entitled to a jury trial upon that issue. *Lembeck & Betz Brewing Co.* v. *Sexton.* 185

2. *Foreclosure — Right of Wife to Redeem Land Sold in Action to Which She Was Not a Party.* A wife not made a party to an action foreclosing a mortgage upon premises owned by her husband, by reason of her inchoate right of dower therein, has the right, after a sale and during his lifetime, to redeem them, and may maintain an action against the purchaser (in this case the holder of the mortgage) for that purpose. *Mackenna* v. *Fidelity Trust Co.* 411

3. *Action to Redeem — Measure of Relief.* The plaintiff in such an action is entitled to the adequate protection of her rights, but no more. She cannot speculate at the expense of the purchaser by waiting until the lands have materially increased in value and then seek to redeem as matter of right, provided the purchaser offers or the court requires him to fully protect her in some other way. Where, therefore, the action was brought nearly two years after the sale, during which time the lands had materially increased in value, a decree, giving her the right of election between a release of her dower right from the lien of the mortgage under which the purchaser took title or the payment to her of the value thereof, with the right to full redemption, if the purchaser does neither, accords to her exact justice; and she is not entitled to a conveyance of the property upon payment of the amount of the mortgage, interest thereon and taxes to the day of redemption. *Id.*

4. *Improper Adjustment of Equities Between the Parties.* A modification of such decree, however, requiring the plaintiff as a condition of redemption to pay to the purchaser the amount of a deficiency judg-

MORTGAGE — *Continued.*

ment obtained by him in another foreclosure, relating to other property, or to deduct the amount from the sum to be paid if she elected to accept the value of her inchoate right of dower, is erroneous; the circumstances not requiring any general adjustment of equities as between the parties, but only such as are directly connected with the land in question and for which the purchaser would be entitled to hold it as security. *Id.*

MUNICIPAL CORPORATIONS.

1. *Liability for the Omission or Commission of Corporate Acts.* A municipality is not liable for an injury, unless it appears that some duty, incumbent upon it to perform, has been neglected or has been improperly discharged; the act, the omission or commission of which is charged as the cause of the injury, must have been within the scope of its corporate powers, as provided by the charter or by some positive enactment of law, and must be ministerial in its nature; if the duty be judicial in its nature, or if it relate to legislation in the public interest or the undertaking of some work of a public nature, which the municipality has not been commanded to do by the state, however comprehensive the powers conferred may be, the duty is necessarily discretionary, because within the exercise of a deliberate judgment. *O'Donnell* v. *City of Syracuse.* 1

2. *Highways.* The fact that a river or stream flowing through a city has been declared a public highway by statute, does not ordinarily impose upon the municipality the duty to keep the stream in a safe condition or free from obstructions, not of its own causing. *Id.*

3. *When City Is Not Liable for Failure to Make Provision Against Floods in Stream Used as Outlet for Its System of Sewers.* Where a municipality is using, and for many years has used, a stream or creek, running through the city, as an outlet or drainage canal for its system of sewers, under the authority of its charter and other special statutes conferring ample powers upon the municipal authorities with respect to the regulating, deepening and improving of the creek and the use thereof for drainage purposes, but no absolute duty with respect to it has been enjoined upon the city by statute, it is not liable to a property owner whose premises were injured by an extraordinary freshet or flood, in which the waters of the creek rose to an unusual height, overflowed its banks and thereby caused much damage to such premises, upon the ground that no effective provision had been made to protect the inhabitants of the city and their property against the dangers of freshets or floods, increased, or at least contributed to, by the use of the creek for sewerage purposes; since the mere use of the stream as an outlet to its system of sewers is not of itself such an assumption of dominion over the stream as to make the city liable for a failure to maintain it in a safe condition; and assuming that the city had full power to make provision for obviating the danger of an overflow, its failure to exercise it was not the neglect of an absolute duty. *Id.*

MURDER.

Trial for — erroneous instructions as to killing after the commission of a burglary had ceased — murder as in the commission of a felony.

See CRIMES, 3, 4.

NEGLIGENCE.

1. *Undisputed Facts Do Not Necessarily Create Question of Law.* In actions for personal injuries arising from negligence and in other actions sounding in tort, although the facts are undisputed, the question does not necessarily become one of law. *Sharp* v. *Erie R. R. Co.* 100

2. *Railroads — No Immunity from Liability for Acts of Servant Because He Is Also a Public Officer — Question for the Jury.* A railroad company which employs a servant to protect its tracks and property and look after crimes committed against it and its right of way, acquires no immunity

NEGLIGENCE — *Continued.*
for the acts of such servant, within the scope of his employment, from the fact that the servant happens to be a constable, policeman or other public officer. It is not beyond the province of a jury in such a case to find that the official acts of the employee are to be used for the benefit of the defendant and in protection of its interests or property; and hence the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all; if he acts maliciously or in pursuit of some purpose of his own, the defendant is not bound by his conduct, but if, while acting within the general scope of his employment, he simply disregards his master's orders or exceeds his powers, the master will be responsible for his conduct. *Id.*

3. *Same.* Where a boy, who had been stealing a ride upon a freight train of a railroad company and had jumped from the train, was pursued by a detective employed by the company to keep tramps and trespassers from its trains and yards, and was followed by him out of the yard and across land adjacent thereto to a point about one hundred feet distant therefrom where he was killed by a shot fired by the detective, who was also outside the yard and about fifty feet behind him, it is for the jury to determine, upon the trial of an action against the company to recover damages for the death of the boy, whether the detective acted within the scope of his employment, or whether, being a public officer, he acted in that capacity alone. *Id.*

4. *Witness — Credibility of, a Question of Fact.* The fact that, after testifying for the plaintiff as to the circumstances resulting in the shooting, the detective on cross-examination testified to facts in the nature of an excuse for his own conduct, which facts were undisputed, does not authorize the court to take the case from the jury, since the question of the credibility of the witness still remained for its determination. *Id.*

5. *Contributory Negligence — When Question of Law.* While the question of contributory negligence is ordinarily one of fact for the jury, yet a party may create by his own acts a controlling presumption that he has been deficient in ordinary caution, and, therefore, guilty of contributory negligence as a matter of law. *Lofsten* v. *Brooklyn Heights R. R. Co.* 148

6. *Same.* Where it appears, in an action brought by a person struck and injured by an electric car while crossing a public street, that, when plaintiff approached the curb of the street through which the railway tracks were laid, he looked and saw a car, distant about fifty feet and approaching at a rate of five or six miles an hour; that from the time he left the curb to cross the street, although there was nothing to obstruct his view or distract his attention, he never looked toward the car or took the slightest pains to ascertain where it was until just before the car struck him, when a shout called his attention to it and looking up he saw it upon him, the plaintiff must be deemed to have not exercised ordinary prudence and is guilty of contributory negligence as a matter of law. *Id.*

7. *Action to Recover for Injuries Caused to Property by Improper and Negligent Use of Explosives in Blasting — Pleading — Parties — Erroneous Nonsuit.* Where the complaint, in an action brought by the owner of an apartment house to recover for damages caused to her property by blasting upon the adjoining lot, alleges that the defendant was a contractor engaged in such work, and that by his improper manner of conducting the blasting and by the use of unnecessary and unreasonable quantities of explosives defendant caused much injury to plaintiff's house and property by the vibration or jarring of the earth or air resulting from such improper and unlawful blasting, the allegation that the defendant was the contractor is immaterial, and it is reversible error, therefore, to dismiss the complaint on the merits, upon the ground that the wrong person had been sued, as the

NEGLIGENCE — *Continued.*

contractor was the defendant's son, the defendant acting merely as a volunteer superintendent for the purpose of helping his son, where it is established, not only by the weight of evidence, but by what must be regarded as the uncontradicted evidence, that the defendant was in charge of the work, having the direction and control thereof. If the work of blasting was so negligently and improperly performed as to have caused the injury to plaintiff's house, all the persons engaged therein are to be regarded as joint tort feasors, and each is severally liable, so that the action is properly brought against the defendant, as in charge of the work of blasting, even if acting as a volunteer superintendent for the benefit of his son or otherwise. *Page* v. *Dempsey.* 245

8. *When Contractual Relations Between Plaintiff and Defendant Will Prevent Recovery for Personal Injuries.* Where, in an action to recover for personal injuries, it appears that in the construction of a railroad switch the workmen went beyond the limits of the company's lands and excavated and set up the switch on adjoining premises which were occupied by its station agent, who, on a dark night, while passing along a path on said premises, fell into the excavation and was injured; that the excavation and switch in question were close to the station; that it was the plaintiff's duty as station agent to keep the station grounds in proper condition for the comfort and convenience of patrons, to know all switches at the station were in safe condition for use and the signals in proper working order; that the plaintiff had been notified of the completion of the switch, but, according to his own testimony, had failed to inspect it and was ignorant of its location or condition; a motion for a nonsuit should be granted, since, though defendant is liable for trespass, the plaintiff, by reason of his contractual relations with defendant, cannot recover for his personal injuries, for if, upon notification of the completion of the switch, he had discharged his plain duty of inspection, he would have been apprised of its location and condition and the accident would have been avoided. *Wood* v. *N. Y. C. & H. R. R. R. Co.* 290

9. *Trial — Erroneous Charge.* An instruction in the charge, to the effect that neither the notification to the plaintiff nor his duty as station agent called upon him to personally inspect the switch or to have personal knowledge that any excavation made in connection with its construction had been filled in or properly guarded, is erroneous, since such notification did impose upon him this duty. *Id.*

10. *Defective Walk at Railroad Crossing — Question of Fact.* Where it appears, in an action brought against a railroad company to recover for injuries resulting from a fall caused by a defective walk over a railroad at a street crossing, that the railroad tracks had been raised at the crossing, planks being placed on either side of each rail, the space between the planks being filled with broken stone and gravel which had settled so that, at the time of the accident and for several weeks prior thereto, there was in the line of the walk and on the outside of the plank along one side of a rail an oblong hole or depression several inches deep, sloping up from its deepest point at the edge of the plank toward the center of the space between the rails; that at the time of the accident, about half-past ten in the evening, plaintiff was walking, slowly across the tracks at the point in question at which no light was maintained by the railroad company, the nearest city light being about one hundred and seventy-five feet distant, when he stepped into such hole or depression, catching his foot under the edge of the plank and fell, seriously fracturing his ankle and leg, it is erroneous to dismiss the complaint, since such hole or depression was such a defect that the question whether the defendant was guilty of negligence in permitting the same to remain in the crossing should have been submitted to the jury. *Durr* v. *N. Y. C. & H. R. R. R. Co.* 320

NEGLIGENCE — *Continued.*

11. *Safety of Working Place — Assumption of Risk — Contributory Negligence — Issue of Fact.* The facts examined in an action brought under the Employers' Liability Act (L. 1892, ch. 600) to recover damages for the alleged negligent killing of plaintiff's intestate, a common laborer, who had been in the employ of the defendant for several years, and was killed by the fall of a portion of a clay bank at the foot of which he was working, and *held*, that a direction of the trial court setting aside a verdict in favor of the plaintiff and directing a dismissal of the complaint was erroneous, where there was some evidence, raising the question as to whether or not the defendant had neglected to properly protect the place where the deceased was working; and also raising the question of the intestate's assumption of a particular risk or of his contributory negligence, all of which questions were, under the circumstances, for the jury. *Reilly* v. *Troy Brick Co.* 399

12. *Wharves and Piers — Obligation of Steamship Companies to Persons, Other Than Passengers, Awaiting the Docking of Vessels.* A steamship company owes no duty to persons upon its pier, awaiting the disembarking of passengers from an incoming vessel, whether they are there as mere licensees or because of an implied invitation from the company, except to have the pier in a reasonably safe condition for access and to exercise such ordinary care in the process of docking the vessel as to render it reasonably safe for persons to remain upon the pier. *Duhme* v. *Hamburg-American Packet Co.* 404

13. *Rule of Res Ipsa Loquitur — When Applicable.* In actions brought to recover for injuries caused by the negligence of a defendant or his servants in which the relations of the plaintiff and defendant are not of a contractual nature, the rule of *res ipsa loquitur* is applicable only when there are actually shown such facts and circumstances, in the nature of the defendant's undertaking and of the accident itself, from which the jury are able, if not compelled, to draw an inference of negligence; it was not intended that the rule should exempt the plaintiff from the burden of proving, affirmatively, negligence, or circumstances making negligence a legitimate, if not an irresistible, inference. *Id.*

14. *Same — Action to Recover for Injuries Caused by Breaking of Steel Hawser Used in Warping Vessel Into a Pier — When Doctrine of Res Ipsa Loquitur Does Not Apply.* Where in an action brought to recover for injuries received by an infant — while standing with his mother in an opening at the edge of a pier awaiting the arrival of a passenger on a transatlantic steamship, from being struck in the face by a steel hawser, with which the steamship was being warped alongside the pier, the hawser being suddenly released and recoiling with great violence by the breaking of an iron "shackle," or clamp, through which the hawser was fastened to a mooring post — there is no evidence on the part of the plaintiff, beyond the statement of the sudden breaking of the hawser, tending in the remotest degree to prove any negligence on the part of the defendant, and the evidence for the defendant shows that the pier was a safe place had the plaintiff and his mother heeded the warnings of defendant's servants and kept within its shelter, and that the breaking of the "shackle" was not due to any defect in its material or manufacture or to the omission of any care in handling the hawser, the circumstances permitting the natural inference that the "shackle" yielded to the tremendous strain put upon the hawser in bringing the vessel from the channel into its berth at the pier, the doctrine of *res ipsa loquitur* does not apply. *Id.*

15. *Municipal Corporations — Notice.* An action against the city of Geneva to recover for personal injuries received from falling on an icy sidewalk cannot be maintained where the plaintiff has failed to serve the notice of "intention to claim damages and of the time and place at which

NEGLIGENCE — *Continued.*

the injuries were received" which is required by the charter. *Biggs* v. *City of Geneva.* 580

Loss of baggage — liability of carrier.

See CARRIERS.

Of carrier in not selecting safe place to unload.

See CONTRACT, 5.

Agreement relieving employer from liability for negligence resulting in personal injuries, void as against public policy.

See MASTER AND SERVANT.

When city not liable for failure to make provision against floods in stream used as outlet for sewerage system.

See MUNICIPAL CORPORATIONS, 1–3.

NEW YORK (CITY OF).

1. *Retirement of Policeman for Disability.* The phrase "unfit for duty," as used in section 355 of the charter of the city of New York (L. 1901, ch. 466), authorizing the compulsory retirement of police officers, means their inability to discharge with average efficiency the duties of the respective grades to which they belong. The fact, therefore, that a policeman is unable to perform full police duty, or every conceivable duty, does not of itself render him liable to retirement. *People ex rel. Metcalf* v. *McAdoo.* 268

2. *Certificate Must Be Signed by Examining Surgeons as Individuals, Not as a Board.* The certificate of disability directed by the statute, "of so many of the police surgeons as the police commissioner may require," must be the personal act of each surgeon who aids in making it, not one that may conceal the persons acting through the signatures of the officers of a board. *Id.*

3. *Insufficiency of Certificate.* An order of the police commissioner of the city of New York dismissing a policeman from the force and placing him on the pension list, based upon a certificate of the board of surgeons that he was "unfit for the performance of full police duty," which was authenticated only by the signatures of the president and secretary, is without jurisdiction through lack of the proper statutory certificate of disability, and such policeman is entitled to reinstatement. *Id.*

Failure to administer oath to a witness in proceeding to remove policeman — waiver.

See TRIAL.

NOTICE.

To consignee of arrival of vessel, when insufficient.

See CONTRACT, 4, 5.

Sale of securities by stockbroker without notice of time or place — insufficient notice.

See CONVERSION, 1, 2.

NUISANCE.

Injury to Enjoyment and Occupation of Leased Premises — Tenant, Not Landlord, May Recover Damages Therefor. Where it appears, upon the trial of an action to restrain a nuisance and for damages caused thereby, that the alleged nuisance was caused by the maintenance and operation of an electric light and power plant by the defendant; that, after the erection of such

NUISANCE — *Continued.*

plant, the plaintiff's premises were leased for a term of years; that, at the expiration of such term, they were leased to the same tenant for another term at a reduced rent; that, at the expiration of this term, they were again leased to the same tenant and at a still lower rent; and it is found by the trial court that, as the electric plant was operated at the time of the trial, no injury was being done to plaintiff's premises and that none was likely to be done in the future; that no damage was suffered by the plaintiff after the beginning of the last lease and although the rental reserved in that lease was less than that for the preceding lease, the difference could be accounted for otherwise than by charging it to the defendant's acts, so that, in effect, the only injury which had been caused by the operation of the electric plant was to the enjoyment and occupation of plaintiffs' premises and was not of a permanent character, — the plaintiffs cannot recover for any depreciation in the rental value, since a tenant under a lease, made during the existence of a nuisance, is entitled to recover the depreciation of the value of the occupation of the premises, and the defendant cannot be subjected to a double recovery for the same injury. *Miller* v. *Edison El. Ill. Co.* 17

Action to restrain continuance of.

See PRACTICE, 1, 2.

OFFICERS.

Employment of layman by attorney to procure clients a misdemeanor warranting forfeiture of office.

See CHAMPERTY, 1.

Public — defamatory statements as to class of — action by one of such officers to recover damages.

See LIBEL.

OYSTERS AND SHELL-FISH.

1. *Act Relating to Cultivation of Shell-fish* (*L.* 1887, *Ch.* 584) — *Conditions of Grant Precedent, Not Subsequent.* The grantee of a perpetual franchise in oyster grounds pursuant to chapter 584 of the Laws of 1887 acquires the exclusive right to the oysters planted thereon only when he performs and continues to perform the statutory conditions of the grant: 1. He must mark out the land proposed to be used and must continue to keep it so marked. 2. He must actually plant or cultivate oysters thereon. These conditions are not subsequent so as to require affirmative action by the state to enforce a forfeiture in case of non-performance, but are precedent, and in such a case the franchise reverts and the rights of the grantee cease. *Vroom* v. *Tilly.* 168

2. *Title to Oysters Planted on Land Under Water Granted for That Purpose to Another Party.* One who in good faith plants oysters on land under water, without knowledge that it has been granted to another for the purpose of cultivating shell-fish thereon, and protects them by the marks recognized by the common law, acquires an exclusive title to the oysters and may maintain an action for their conversion, where the grantee, although designating the boundaries of the grant by buoys at the time it was made, as required by the statute, fails thereafter to maintain them or to cultivate oysters thereon. *Id.*

PARENT AND CHILD.

When testator stood "in the mutually acknowledged relation of a parent" to a legatee, so that the latter is entitled to exemption from transfer tax.

See TAX, 2.

PARTIES.
In action to recover for injuries caused to property by improper and negligent use of explosives in blasting.
See NEGLIGENCE, 7.

Defect in.
See PLEADING, 1.

PARTITION.
Of lands under agreement — effect of recitals in deeds upon question whether title to center of highway was conveyed.
See REAL PROPERTY, 2–5.

When power to partition and allot real estate given to trustees involves power to sell — action to partition and sell real estate after some of the *cestui que trustent* have become of age — when judgment therein is *res adjudicata* against parties thereto — service of summons on infant residing out of state.
See REAL PROPERTY, 6–9.

PENAL CODE.
1. § 183 — *Murder — Erroneous Instructions as to Killing After the Commission of a Burglary Had Ceased.* Where it appears upon the trial of a defendant indicted for murder in the first degree for killing a police officer, who was attempting to arrest him, that defendant, while attempting to commit a burglary, was discovered by a private watchman; that abandoning the property which he had stolen, he ran from the building pursued by the watchman until they were seen by a policeman who took up the pursuit, calling upon defendant to stop or he would shoot; that after following him for about three hundred feet the policeman had so gained upon the defendant that he was but a few feet distant from him when the latter suddenly drew his revolver and shot the policeman, producing a wound from which he died, it is reversible error to instruct the jury that in case the defendant did not intend to kill the policeman, and that the killing was without premeditation, yet if they found that he fired the shot at the policeman after he had attempted to burglarize or had burglarized the premises described in the indictment and was attempting to escape therefrom, then the verdict ought to be for murder in the first degree; since, at the time of the killing the defendant had ceased to be engaged in the commission of a burglary. (Penal Code, § 183.) *People* v. *Hüter.* 237

2. § 218 — *Murder in the Commission of a Felony.* A conviction for murder in the first degree, as in the commission of a felony is not warranted by the fact that at the time of the killing the defendant was engaged in the commission of another felony, *i. e.*, an assault upon an officer to prevent or resist the apprehension of himself (Penal Code, § 218, subd. 5); since the assault being the gist of the offense becomes a constituent part of and is merged in the homicide, and cannot be regarded as a separate and independent felony, which although committed "without a design to effect death," would bring the case within the statute. *Id.*

PENALTIES.
Statute Inflicting Penalties — Construction. Where there is a reasonable doubt as to the construction of a statute prescribing a penalty for its violation, the party of whom the penalty is claimed is entitled to the benefit of it. *Goodspeed* v. *Ithaca Street Ry. Co.* 351

Excessive charge by street railway company — when company overcoming certain grade not liable for penalty
See RAILROADS, 1, 2.

PIERS.

Obligation of steamship company to persons other than passengers awaiting docking of vessel.

See NEGLIGENCE, 12-14.

PLEADING.

1. *Demurrer — Defect in Parties Defendant.* Where the complaint in an action asks relief against several persons not made parties, and whose presence is not necessary to a complete determination of the controversy, the prayer for relief may be deemed surplusage, and a failure to join them as defendants is not a ground for demurrer. *O'Connor* v. *Virginia P. & P. Co.* 46

2. *Stockholder's Action — Allegations Necessary.* Where an action is brought by a stockholder against the corporation and three other defendants to have certain certificates of shares of stock of the corporation and certain of its mortgage bonds adjudged void, or, in lieu thereof, that the three last-named defendants pay to the corporation the value of such stock and bonds, the claim of the plaintiff is derivative and he is obliged to allege, *first*, a good cause of action in favor of the company of which he is a stockholder, and, *second*, facts which authorize his intervention and the institution of his suit in behalf of the corporation. *Id.*

3. *Demurrer upon Ground of Improper Joinder of Causes of Action.* Where such complaint states two grievances, one of which constitutes a good cause of action in favor of the corporation of which he is a stockholder, and the other does not, and, so far as appears on the face of the complaint, the two grievances were independent transactions having no connection with each other, and there is no allegation that they were committed in pursuance of any common design or agreement, such grievances constitute separate causes of action within the meaning of the Code of Civil Procedure (§ 484) and the rules of pleading, and a demurrer to the complaint upon the ground that several causes of action are improperly united is well taken and should be sustained; nor are the defendants concluded from demurring thereto by a decision of the Special Term denying a motion made by them for an order requiring the plaintiff to separately state and number his two causes of action, upon the ground that there was but one cause of action. *Id.*

4. *Stockholder's Demand That Corporation Bring Action.* Where such complaint states a good cause of action in favor of the corporation against the other defendants, but does not allege that a demand was made upon the corporation to bring and prosecute the action and that such demand was refused, it fails to state a cause of action in plaintiff's favor unless it contains allegations sufficient to relieve him from making such application; and where an examination of the complaint fails to disclose any adequate excuse for plaintiff's failure to apply to the corporation, a demurrer thereto upon the ground that it does not state facts sufficient to constitute a cause of action in favor of plaintiff will be sustained. *Id.*

5. *Denial Should Be Clear and Specific — Code Civ. Pro.* § 500. A denial contained in an answer of all the allegations contained in specified folios of a complaint, except as hereinafter admitted, is not good pleading. It should not, however, be treated as a nullity and thereby deprive the defendant of his right to trial or to amend; the proper remedy is by a motion to have the answer made more specific and certain. *Thompson* v. *Wittkop.* 117

Demurrer to complaint properly overruled.

See LIBEL.

Complaint in action to recover for injuries caused to property by negligent use of explosives in blasting.

See NEGLIGENCE, 7.

PLEDGE.
Sale of securities by stockbrokers without notice of time or place.
See CONVERSION, 1, 2.

POLICE.
Retirement for disability — insufficiency of certificate.
See NEW YORK (CITY OF), 1–3.

Failure to administer oath to a witness in proceeding to remove policeman — waiver.
See TRIAL.

POWERS.
Power of attorney authorizing service of process upon state insurance commissioner — effective revocation as to non-residents.
See CORPORATIONS, 2–4.

PRACTICE.
1. *Equity — When Court, upon Denial of Equitable Relief, May Retain Jurisdiction and Determine Whether Damages Should Be Awarded.* A court of equity, which has obtained jurisdiction of an action brought by a landowner to restrain the continuance of a nuisance, and for damages, alleged to be caused by the maintenance and operation of a plant for the production of electric light and power, may retain the case, although it is found that the nuisance was abated at the time of the trial and that it was improbable that any would be created in the future, and may determine whether the plaintiff is entitled to any damages. *Miller* v. *Edison El. Ill. Co.* 17

2. *Right to Trial by Jury.* The denial of equitable relief in an action brought to restrain the continuance of a nuisance and to recover the damages sustained, does not make the action triable, as of right, by a jury. *Id.*

Application of particular Code provisions to common-law arbitration — waiver of oath must be in writing.
See ARBITRAMENT AND AWARD, 1, 2.

Construction of complaint upon which warrant for violation of Game Law is issued.
See CONSTITUTIONAL LAW, 3.

Enforcement of creditors' lien against insurance moneys.
See JURISDICTION, 1, 2.

Remedy for irregular service of summons of Justice's Court.
See PROHIBITION, 2.

PROBABLE CAUSE.
When a question of law in an action for malicious prosecution.
See MALICIOUS PROSECUTION.

PROCESS.
Irregular service of summons.
See PROHIBITION, 2.

Service of summons on infant residing out of state.
See REAL PROPERTY, 9.

PROHIBITION.
1. *Writ of Prohibition.* A writ of prohibition will not be allowed to guard against a future apprehended error by an inferior tribunal, when, as matter of fact, such tribunal upon due objection may not commit such error and when, if it does commit it, the aggrieved party may

PROHIBITION — *Continued.*

be fully and adequately protected by ordinary process of appeal from, or review of, its action. *People ex rel. Ballin* v. *Smith.* 96

2. *Same — When Will Not Issue to Restrain Prosecution of Action in Justice's Court — Irregular Service of Summons — Remedy.* A justice of the peace has power to entertain an application to set aside the service of a summons; the defendant may specially appear and state the facts upon which he bases his claim of privilege without any waiver of his rights; if in a proper case the justice refuses to set aside the service the remedy is by an appeal. (Code Civ. Pro. §§ 3053, 3057.) The allowance, therefore, in such a case of a writ of prohibition restraining the further prosecution of the action constitutes reversible error, and an order granting the writ must be reversed. *Id.*

Writ of — when will issue.

See CRIMES, 1.

PUBLIC INSTRUCTION.

Authority of superintendent of, to establish regulation as to use of religious dress by teachers.

See SCHOOLS, 1-3.

RAILROADS.

1. *Unlawful Fare — Mistake of Law.* The Railroad Law (L. 1890, ch. 565, § 39, amd. L. 1892, ch. 676), inflicting a penalty for exacting an unlawful rate of fare unless the "overcharge was made through inadvertence or mistake not amounting to gross negligence," contemplates that the mistake relieving the corporation from the penalty may be one of law as well as one of fact; and where there is shown to have been a mistake by the corporation in the construction of its statutory rights, a mistake, not the result of carelessness in being advised upon the subject, but an honest mistake, such as would govern the conduct of an ordinarily prudent person honestly desiring to act within his rights, the corporation is exempt from the penalty. *Goodspeed* v. *Ithaca Street Ry. Co.* 351

2. *Street Railroads — Penalty for Excessive Charge by Street Railway Company — When Company Overcoming Certain Grade Not Liable for Penalty.* A street railroad company having a railroad which overcomes in its route an elevation exceeding 300 feet to the mile, within a distance of two miles, is not liable for the penalty imposed by section 39 of the Railroad Law (L. 1890, ch. 565) for charging and collecting a fare of ten cents for a continuous ride over its road where the company, acting in good faith and laboring under an honest mistake of law, which was not the result of carelessness in being advised as to its rights, construed the statute (Railroad Law, § 37) as comprehending within its operation a street railroad corporation, since section 39 of the Railroad Law, assuming its applicability to a street railroad corporation, may be read as including within its exemption from the penalty cases of mistakes in law as well as mistakes in fact. *Id.*

Elevated — action against, for damages to easements of abutting property.

See EASEMENTS, 1-4.

No immunity from liability for acts of servant because he is also a public officer.

See NEGLIGENCE, 2, 3.

Street — contributory negligence of person injured by car while crossing street.

See NEGLIGENCE, 5, 6.

RAILROADS — *Continued.*

Liability for personal injuries arising from defective walk at crossing.

See NEGLIGENCE, 10.

Liability for unintentional encroachment on lands adjoining right of way.

See TRESPASS.

REAL PROPERTY.

1. *Tenancy by Curtesy.* An estate by the curtesy does not attach to property conveyed to a wife subject to the use and occupation of another during life, where she was never in actual possession of the property and she died before the termination of the life estate. *Collins* v. *Russell.* 74

2. *Highways — Presumption as to Ownership of Fee of Roadbed.* While it is the general rule that the fee of the soil of a highway is presumed to belong to the adjoining owners, and that a person holding land bounded by a highway is *prima facie* the owner to the center of the highway subject to the easement of the public to the right of way, such presumption may be rebutted by an express provision in the deed to such owner to the effect that the fee to the highway was not intended to be conveyed, or by the use of such words as necessarily exclude the highway from the description of the premises conveyed; but where there is ambiguity with reference to the description or to the commencing point, or where there is doubt with reference to the intent of the grantor, the presumption that the fee was intended to pass will prevail; for in such case the construction must be that most favorable to the grantee. *Van Winkle* v. *Van Winkle.* 193

3. *Partition — Effect of Recitals in Deeds Partitioning Lands under Agreement upon Question Whether Title to Center of Highway Was Conveyed or Not.* Where land sought to be partitioned in an action in the Supreme Court was formerly the bed of a road, or public highway, running through lands formerly owned by a common ancestor of parties to the action, claiming under certain ancient deeds, and which highway was discontinued by acts of the legislature long after the execution of such deeds, so that the fee to the roadbed reverted to the then owners of the adjoining lands unless the title thereto had been reserved by such deeds, and it appears from recitals therein that such deeds were executed by the heirs of the common ancestor under an agreement to partition all of the real estate of such ancestor among themselves, and that such partition had reference to all the lands of such ancestor bounded upon such public highway, it must be held that such heirs intended that such partition should have the same force and effect as if made in court; and that they designed to divide among themselves all of the lands belonging to their ancestor, including the fee to the roadbed in question, where the latter was not reserved by express provisions in such deeds, or by use of words necessarily excluding it from the description of the lands conveyed. *Id.*

4. *Deeds — Boundaries and Description of Land Abutting on a Street or Highway — When Title to Center of Street, or Highway, Is Conveyed.* Where a line runs to a stake or to a mark upon a fence or a tree upon the side of a highway, and thence along the highway, the stake, mark or tree will be deemed to indicate the place of the line and not the end thereof, by reason of the difficulty of maintaining a visible object marking the corner in the roadbed of a highway, thus vesting the title to the center of the street, or highway, in the grantee. *Id.*

5. *Same.* Where a deed gives the boundaries of land conveyed by courses and distances, without mentioning a street by which the same is bounded on one side, and it appears that the distance given does in fact carry the boundary to the street and along it, it is the same as though the boundary were described as running to the street and along the same, thus extending the title to the center. *Id.*

REAL PROPERTY — *Continued.*

6. *Will — Construction of Clauses Creating Trusts for Benefit of Children — When Power to Partition and Allot Real Estate, Given to Trustee, Involves Power to Sell.* Where a testator, after bequeathing an annuity and several legacies, charging them upon his realty if the personalty should be insufficient, gave the rest of his estate, real and personal, to his executors in trust, directing them to sell the realty and convert it into personalty, and to divide the net estate into eight equal shares and pay the income of one thereof to each of his eight children during minority, and upon each child attaining majority to pay over to such child his or her share, and further provided that whenever any child should attain lawful age or die under lawful age, to make partition of his real estate and allot and set apart to each child attaining lawful age, or to the heirs of a child dying under lawful age, his or her share of the real estate; and by a subsequent codicil testator revoked the provision authorizing the sale of all his real estate and directed his executors to sell three parcels only, and use the proceeds thereof to pay the mortgages on the remainder, expressly stating that he did not intend to alter the beneficial interests of his children in the land or the trusts established for their benefit, but ratifying and confirming the same, so that the executors still had the power to make partition of the real estate and allot the same among the testator's children or their heirs, as originally provided, such power to partition necessarily carries with it the power to sell, where the real estate is so situated that actual partition cannot be had, and the power given to the executors devolves upon the court if, for any reason, they are disqualified or refuse to act. *O'Donaghue* v. *Smith*. 365

7. *Same — Action to Partition and Sell Real Estate After Some of the Cestui Que Trustent Have Become of Age — Power of Court — When Judgment Therein Is Res Adjudicata Against Parties Thereto.* Where an action for the partition and sale of testator's real estate was instituted ten years after his death by the eldest of his children who was also one of his executors, one of the other children having died and four of them having become of age and desiring their shares of the estates paid over to them, and the trust, as to them, terminated, such children and the widow being made parties to the action, the infant defendants appearing by their guardians *ad litem*, who put in the usual answer submitting their rights and interests to the protection of the court, the judgment of partition and sale rendered in such action is *res adjudicata* and a bar to an action of ejectment afterward brought by such infant defendants to recover their proportionate shares of testator's real estate, since the court was required to examine the provisions of testator's will and determine whether or not a sale of his real estate was prohibited or longer postponed, and having determined those questions in the negative, it had the power to order judgment in accordance therewith; if the court erred in such determination the error could have been corrected by an appeal, but when this was not done, such judgment became final and conclusive upon the parties, and cannot, in the absence of fraud, be questioned collaterally. *Id.*

8. *Same — When Judgment of Sale in Such Action of Partition Is Not in Contravention of Provisions of Will.* The contention, that the judgment of sale in such action of partition is void because it violates the provisions of the statute prohibiting the sale of the real estate of infants in contravention of a will or deed under which their estate is created, is untenable, since the statute has no application where there are adult tenants in common who have an immediate right to the possession of their share; if all the tenants in common derive their estate through the same will or deed, and if, under the instrument, when one becomes of age he is entitled to have his share, he may maintain partition and have a sale, if necessary, for it no longer would be in contravention of the instrument, but in accordance with its provisions, giving to him the immediate right to possess his share. *Id.*

REAL PROPERTY — *Continued.*

9. *Same — Service of Summons on Infant Residing Out of the State — When Regular Under the Statute in Force in* 1869 (*Code Pro.* § 448 *and* 2 *R. S. Part* 3, *Ch.* 5, *Tit.* 3, § 12). Where the statutes relating to actions in partition in force in 1869 (Code Pro. § 448, and 2 R. S. part 3. ch. 5, tit. 3, § 12) provided that if any of the parties were unknown or if either of the known parties were minors or of full age residing out of the state, service could be made by publication, or instead thereof, with respect to any known absent party, the petition and notice (under the Code, summons and complaint) might be served personally out of this state, forty days previous to its presentation, without publishing the same, the due and timely service of the summons in an action of partition commenced in 1869 upon an infant defendant and on the p. rson with whom such infant was temporarily residing out of the state, was regular and gave the court jurisdiction of such infant, especially where her mother, with whom she resided when at home within this state, thereafter petitioned, as the next friend of such infant, to be appointed her guardian *ad litem*, and was regularly appointed such guardian and appeared in the action by an attorney who interposed the usual answer submitting the rights and interests of such infant to the protection of the court; the fact that the original affidavit of the service of the summons was defective by reason of the omission of the jurat of the commissioner of deeds before whom it was taken is immaterial where it was subsequently cured by another affidavit which, under an order of the court, was filed *nunc pro tunc* as of the date of the first affidavit. *Id.*

10. *Escheat — Failure to File Declaration of Citizenship by Alien Heir.* Under section 4 of chapter 115 of the Laws of 1845 (amd. L. 1874, ch. 261; L. 1875, ch. 38) an alien inheriting real estate from a citizen could hold it as against the state only by making and filing a deposition or affirmation of his intention to become a citizen, as required by the first section of the act. A failure to file such declaration rendered his title liable to forfeiture during life by the state in proceedings to be taken for that purpose; upon his death without having filed such declaration, the fact that the state failed in his lifetime to take such proceedings did not constitute a waiver or loss of its rights and permit him to transmit his title by inheritance to a citizen heir; but his death *ipso facto* worked an immediate escheat to the state, no proceedings on its part having been necessary to effect it, and, therefore, in the absence of any legislation authorizing it, the title of such heir cannot be successfully maintained as against the state, in a subsequent partition action in which it asserts its rights. *McCormack* v. *Coddington.* 467

11. *Insufficiency of Statutes Relied upon as Waiving Right of Escheat — L.* 1877, *Ch.* 111; *L.* 1893, *Ch.* 207; 1 *R. S.* 754, § 22. Subsequent legislation claimed to have waived such defect in title or to have perfected title in such heir, cannot be so regarded: 1. Chapter 111 of the Laws of 1877 assumes to relieve from question or impeachment a right, title or interest which has been "acquired" by a citizen — the title in this case having reverted to the state, nothing was acquired by the heir. 2. Chapter 207 of the Laws of 1893, passed after the death of such alien, while broad enough in its language to justify the contention, relates to cases arising after its passage, and not to that of an alien dying before it took effect; if given a retroactive effect it would be unconstitutional, not purporting to have been passed by the two-thirds vote necessary to divest the state of its title. (Const. art. 3, § 20.) 3. The Revised Statutes (1 R. S. 754, § 22), providing that no person capable of inheriting shall be precluded therefrom by reason of the alienism of any ancestor, would cure the trouble arising from the alienism of an intermediate link in the chain of pedigree if the alien in question had been otherwise capable of transmitting title. *Id.*

REAL PROPERTY — *Continued.*

12. *Statutes of Descent Require Ancestor to Be Possessed of Some Inheritable Title.* The fact that the Statutes of Descent expressly qualified and entitled the heir to inherit from such alien is immaterial for the reason that there was no interest to inherit. Those statutes require not only a person capable of inheriting, but also an ancestor possessed of some title which is the subject of transmission at the time of his death. *Id.*

13. *Aliens — When Cannot Inherit.* Lands in this state inherited in 1876 by a non-resident alien from a naturalized citizen, who took by purchase, could not be inherited in 1888 from such non-resident alien by his descendant who was also a non-resident alien. *Stewart* v. *Russell.* 601

Easements, although reserved, pass with conveyance of freehold — effect of reservation is to make grantee the trustee of moneys received for subsequent conveyance — grantee alone can sue for damages or execute release.

See EASEMENTS, 1–4.

Construction of reservoir upon land before condemnation proceedings are had constitutes a trespass — measure of compensation.

See EMINENT DOMAIN, 1–3.

Right of wife of mortgagor to redeem land sold in foreclosure action to which she was not a party — measure of relief.

See MORTGAGE, 2–4.

Injury to enjoyment and occupation of leased premises — tenant, not landlord, may recover damages.

See NUISANCE.

Liability for result of unintentional encroachment.

See TRESPASS.

Action to recover for false representations made to induce purchase of real property.

See VENDOR AND PURCHASER, 1–3.

RES ADJUDICATA.

Failure to deliver installments of goods sold, as agreed, a breach of entire contract — damages recoverable in one, not successive actions.

See ESTOPPEL.

When judgment in action of partition is *res adjudicata* as to parties thereto.

See REAL PROPERTY, 7.

REVISED STATUTES.

1. 1 *R. S.* 754, § 22 — *Insufficiency of Statutes Relied upon as Waiving Right of Escheat.* Subsequent legislation claimed to have waived a defect in title arising from the failure of an alien inheriting real estate to make affirmation of his intention to become a citizen, or to have perfected title in his heir, cannot be so regarded: 1. Chapter 111 of the Laws of 1877 assumes to relieve from question or impeachment a right, title or interest which has been "acquired" by a citizen — the title in this case having reverted to the state, nothing was acquired by the heir. 2. Chapter 207 of the Laws of 1893, passed after the death of such alien, while broad enough in its language to justify the contention, relates to cases arising after its passage, and not to that of an alien dying before it took effect; if given a retroactive effect it would be unconstitutional, not purporting to have been passed by the two-thirds vote necessary to divest the state of its title. (Const. art. 3, § 20.) 3. The Revised Statutes (1 R. S. 754, § 22), providing that no person capable of inheriting shall

REVISED STATUTES — *Continued.*

be precluded therefrom by reason of the alienism of any ancestor, would cure the trouble arising from the alienism of an intermediate link in the chain of pedigree if the alien in question had been otherwise capable of transmitting title. *McCormack* v. *Coddington.* 467

2. 2 *R. S.* 319, § 12 — *Service of Summons on Infant Residing Out of the State — When Regular Under the Statute in Force in* 1869. Where the statutes relating to actions in partition in force in 1869 (Code Pro. § 448, and 2 R. S. part 3, ch. 5, tit. 3, § 12) provided that if any of the parties were unknown or if either of the known parties were minors or of full age residing out of the state, service could be made by publication, or instead thereof, with respect to any known absent party, the petition and notice (under the Code, summons and complaint) might be served personally out of this state, forty days previous to its presentation, without publishing the same, the due and timely service of the summons in an action of partition commenced in 1869 upon an infant defendant and on the person with whom such infant was temporarily residing out of the state, was regular and gave the court jurisdiction of such infant, especially where her mother, with whom she resided when at home within this state, thereafter petitioned, as the next friend of such infant, to be appointed her guardian *ad litem*, and was regularly appointed such guardian and appeared in the action by an attorney, who interposed the usual answer submitting the rights and interests of such infant to the protection of the court; the fact that the original affidavit of the service of the summons was defective by reason of the omission of the jurat of the commissioner of deeds before whom it was taken is immaterial where it was subsequently cured by another affidavit which, under an order of the court, was filed *nunc pro tunc* as of the date of the first affidavit. *O'Donaghue* v. *Smith.* 365

SALE.

Of goods in bond — when vendee entitled to duty refunded thereon.

See CONTRACT, 1.

Contract of — waiver.

See CONTRACT, 2.

Contract of — provision that additional sums should be paid on favorable test of article.

See CONTRACT, 6.

Failure to deliver installments as agreed a breach of entire contract.

See ESTOPPEL.

SCHOOLS.

1. *Authority of Superintendent of Public Instruction to Regulate Management.* While under the Consolidated School Law (L. 1894, ch. 556) the state superintendent of public instruction had no express authority to establish regulations as to the management of the public schools, such authority was clearly implied therein, the validity of such regulations depending upon whether or not they were reasonable, were consonant with the general purpose of the statute and were not inconsistent with the laws and policy of the state. *O'Connor* v. *Hendrick.* 421

2. *Regulation as to Use of Religious Dress by Teachers.* A regulation established by such superintendent prohibiting teachers in public schools from wearing a distinctly religious garb while engaged in the work of teaching therein, is a reasonable and valid exercise of the power conferred upon him, not because the wearers of such apparel should be excluded from teaching in the public schools on account of their religious convictions or membership in religious orders, since, if otherwise qualified and by their acts as teachers they do not promote any denominational doctrine or tenet, there is no reason, morally or legally, why they should

SCHOOLS — *Continued.*

be disqualified, but because the influence of such apparel is distinctly sectarian, even if the wearing of it does not amount to the teaching of denominational doctrine, and the prohibition is in accord with the public policy of the state as declared in the Constitution (Const. art. 9, § 4), forbidding the use of the property or credit of the state in aid of sectarian influences. *Id.*

3. *Refusal to Comply with Regulation Forfeits Salary.* A refusal by teachers employed in a public school to comply with such regulation after notification thereof, forfeits their right to further compensation under their contract of employment, since one of the implied obligations of such contract is to obey all reasonable regulations as to the management of the school made by the superintendent, and, therefore, a contention that he had no power to annul it is without force. *Id.*

SERVICE.

Irregular service of summons — remedy.

See PROHIBITION, 2.

Of summons on infant residing out of state.

See REAL PROPERTY, 9.

SERVICES.

Action for.

See APPEAL, 2.

SESSION LAWS.

1. 1845, *Ch.* 115 — *Escheat — Failure to File Declaration of Citizenship by Alien Heir.* Under section 4 of chapter 115 of the Laws of 1845 (amd. L. 1874, ch. 261; L. 1875, ch. 88) an alien inheriting real estate from a citizen could hold it as against the state only by making and filing a deposition or affirmation of his intention to become a citizen, as required by the first section of the act. A failure to file such declaration rendered his title liable to forfeiture during life by the state in proceedings to be taken for that purpose; upon his death without having filed such declaration, the fact that the state failed in his lifetime to take such proceedings did not constitute a waiver or loss of its rights and permit him to transmit his title by inheritance to a citizen heir; but his death *ipso facto* worked an immediate escheat to the state, no proceedings on its part having been necessary to effect it, and, therefore, in the absence of any legislation authorizing it, the title of such heir cannot be successfully maintained as against the state, in a subsequent partition action in which it asserts its rights. *McCormack* v. *Coddington.* 467

1874, *Ch.* 261. See par. 1, this title.

1875, *Ch.* 88. See par. 1, this title.

2. 1875, *Ch.* 181 — *Villages — Water Works — Reservoir Constructed upon Land Before Condemnation Proceedings Are Had and Compensation Awarded to Owner, Constitutes a Trespass.* Where the authorities of a village, not only without the consent of the owner, but against his express command and remonstrance, entered upon his lands and constructed thereon an intake or reservoir for the village water works and laid pipes for conducting water to and from the reservoir, before instituting condemnation proceedings, such entry and invasion is clearly tortious, the village and its agents being mere trespassers, notwithstanding a survey had been made and a map of the land and water rights proposed to be taken had been filed under the statute then in force (L. 1875, ch. 181, § 5, as amd. by L. 1885, ch. 211 and L. 1895, ch. 383); since the mere making and filing of the map did not empower the village to take possession of the premises described therein and erect a water plant thereon; it is only after condemnation proceedings have been had and confirmed by the Supreme Court and the

SESSION LAWS — *Continued.*

compensation awarded to the landowner has been paid or deposited in court, that the village becomes entitled to take and hold the property (L. 1875, ch. 181, § 6, subd. 8, as amd. by L. 1885, ch. 211); the only entry which the statute authorizes to be made before condemnation is "for the purpose of making surveys and to agree with the owner" as to the amount of compensation. (L. 1875, ch. 181, § 4, as amd. by L. 1885, ch. 211 and L. 1895, ch. 383.) *Village of St. Johnsville* v. *Smith.* 341

3. 1877, *Ch.* 111 — *Insufficiency of Statutes Relied upon as Waiving Right of Escheat* — *L.* 1877, *Ch.* 111; *L.* 1893, *Ch.* 207; 1 *R. S.* 754, § 22. Subsequent legislation claimed to have waived a defect in title arising from the failure of an alien inheriting real estate to make affirmation of his intention to become a citizen, or to have perfected title in his heir, cannot be so regarded: 1. Chapter 111 of the Laws of 1877 assumes to relieve from question or impeachment a right, title or interest which has been "acquired" by a citizen — the title in this case having reverted to the state, nothing was acquired by the heir. 2. Chapter 207 of the Laws of 1893, passed after the death of such alien, while broad enough in its language to justify the contention, relates to cases arising after its passage, and not to that of an alien dying before it took effect; if given a retroactive effect it would be unconstitutional, not purporting to have been passed by the two-thirds vote necessary to divest the state of its title. (Const. art. 3, § 20.) 3. The Revised Statutes (1 R. S. 754, § 22), providing that no person capable of inheriting shall be precluded therefrom by reason of the alienism of any ancestor, would cure the trouble arising from the alienism of an intermediate link in the chain of pedigree if the alien in question had been otherwise capable of transmitting title. *McCormack* v. *Coddington.* 467

4. 1882, *Ch.* 36 — *New York Produce Exchange — Beneficiaries' Interest in Gratuity Fund Assignable as Security for Sums Advanced to Pay Dues and Assessments.* Under a by-law of the New York Produce Exchange, relating to the gratuity fund established pursuant to chapter 36 of the Laws of 1882, which provided that "Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts; but it shall be construed as the solemn agreement of every subscribing member of the New York Produce Exchange to make a gift to the family of each deceased member, and of the exchange to collect and pay over to the family the said gift," while the interest of beneficiaries in such fund cannot be assigned in payment or to secure the payment of a debt having no relation to such fund and in nowise incurred for the purpose of keeping alive their interests in the fund, it is assignable, however, as security for the repayment of such moneys as may be paid by another to keep alive such interests, and without which they must have been absolutely destroyed. *Holmes* v. *Seaman.* 486

1885, *Ch.* 211. See par. 2, this title.

5. 1887, *Ch.* 584 — *Oysters — Act Relating to Cultivation of Shell-fish — Conditions of Grant Precedent, Not Subsequent.* The grantee of a perpetual franchise in oyster grounds pursuant to chapter 584 of the Laws of 1887 acquires the exclusive right to the oysters planted thereon only when he performs and continues to perform the statutory conditions of the grant: 1. He must mark out the land proposed to be used and must continue to keep it so marked. 2. He must actually plant or cultivate oysters thereon. These conditions are not subsequent so as to require affirmative action by the state to enforce a forfeiture in case of non-performance, but are precedent, and in such a case the franchise reverts and the rights of the grantee cease. *Vroom* v. *Tilly.* 168

6. 1890, *Ch.* 564 — *Stock Corporation Law — Reduction of Capital Stock While Company Is in Default of Dividends on Preferred Stock — Rights of Preferred Stockholders.* The fact that a corporation, having failed to

SESSION LAWS — *Continued.*

pay any dividends on its preferred stock for three years, reduced its capital stock under the statute (Stock Corporation Law [L. 1890, ch. 564], § 44, as amd. by L. 1892, ch. 688), giving to its stockholders their proportionate number of shares in exchange for their former holdings, does not affect the rights of the preferred stockholders as to previous arrears of dividends; as a result of such reduction, the preferred stockholders have a less number of shares, but, as between themselves and the other stockholders, they are still creditors for the arrears of dividends due from the company on the shares of preferred stock which they had previously held, and are entitled to be paid such arrears, with the stipulated interest thereon, before any of the surplus profits can be appropriated to a dividend upon the common stock. *Roberts* v. *Roberts-Wicks Co.* 257

7. 1890, *Ch.* 565 — *Railroad Law — Unlawful Fare — Mistake of Law.* The Railroad Law (L. 1890, ch. 565, § 39, amd. L. 1892, ch. 676), inflicting a penalty for exacting an unlawful rate of fare unless the "overcharge was made through inadvertence or mistake not amounting to gross negligence," contemplates that the mistake relieving the corporation from the penalty may be one of law as well as one of fact; and where there is shown to have been a mistake by the corporation in the construction of its statutory rights, a mistake, not the result of carelessness in being advised upon the subject, but an honest mistake, such as would govern the conduct of an ordinarily prudent person honestly desiring to act within his rights, the corporation is exempt from the penalty. *Goodspeed* v. *Ithaca Street Ry. Co.* 351

8. *Street Railroads — Penalty for Excessive Charge by Street Railway Company — When Company Overcoming Certain Grade Not Liable for Penalty.* A street railroad company having a railroad which overcomes in its route an elevation exceeding 300 feet to the mile, within a distance of two miles, is not liable for the penalty imposed by section 39 of the Railroad Law (L. 1890, ch. 565) for charging and collecting a fare of ten cents for a continuous ride over its road where the company, acting in good faith and laboring under an honest mistake of law, which was not the result of carelessness in being advised as to its rights, construed the statute (Railroad Law, § 37) as comprehending within its operation a street railroad corporation, since section 39 of the Railroad Law, assuming its applicability to a street railroad corporation, may be read as including within its exemption from the penalty cases of mistakes in law as well as mistakes in fact. *Id.*

9. 1892, *Ch.* 600 — *Employers' Liability Act — Negligence — Safety of Working Place — Assumption of Risk — Contributory Negligence — Issue of Fact.* The facts examined in an action brought under the Employers' Liability Act (L. 1892, ch. 600) to recover damages for the alleged negligent killing of plaintiff's intestate, a common laborer, who had been in the employ of the defendant for several years, and was killed by the fall of a portion of a clay bank at the foot of which he was working, and *held*, that a direction of the trial court setting aside a verdict in favor of the plaintiff and directing a dismissal of the complaint was erroneous, where there was some evidence, raising the question as to whether or not the defendant had neglected to properly protect the place where the deceased was working; and also raising the question of the intestate's assumption of a particular risk or of his contributory negligence, all of which questions were, under the circumstances, for the jury. *Reilly* v. *Troy Brick Co.* 399

1892, *Ch.* 676. See par. 7, this title.

1892, *Ch.* 688. See par. 6, this title.

1893, *Ch.* 207. See par. 3, this title.

SESSION LAWS — *Continued.*

10. 1894, *Ch.* 556 — *School Law — Authority of Superintendent of Public Instruction to Regulate Management.* While under the Consolidated School Law (L. 1894, ch. 556) the state superintendent of public instruction had no express authority to establish regulations as to the management of the public schools, such authority was clearly implied therein, the validity of such regulations depending upon whether or not they were reasonable, were consonant with the general purpose of the statute and were not inconsistent with the laws and policy of the state. *O'Connor* v. *Hendrick.* 421

1895, *Ch.* 383. See par. 2, this title.

11. 1896, *Ch.* 112 — *Liquor Tax Law — When Rear Door of a City Dwelling Is Not an "Entrance" Within Meaning of Section* 17, *Subd.* 8. A rear door of a city dwelling, leading to the back yard thereof and inaccessible to anybody desiring to pass from the street, or other point outside of the dwelling into the latter, is not an "entrance" within the meaning of the statute (Liquor Tax Law [L. 1896, ch. 112], § 17, subd. 8) requiring the consent of at least two-thirds of the owners of dwelling houses within 200 feet of a proposed saloon, such distance to be "measured in a straight line of the nearest entrance to a building or buildings occupied exclusively for a dwelling." *McDougal* v. *Malaghan.* 253

12. 1896, *Ch.* 272 — *Domestic Relations Law — Surrogate Has No Jurisdiction to Enforce Creditor's Lien against Insurance Moneys under Section* 22, *Domestic Relations Law.* A surrogate has only such jurisdiction as is expressly or by necessary implication conferred by statute. While the tendency of recent legislation has been to enlarge his powers, he has not yet been given the broad powers of a court of equity which are necessary to enforce a creditor's lien upon the proceeds of a policy of insurance issued on the life of a husband in which the wife was named as the beneficiary and the annual premium on which was in excess of $500, and to determine, in a proceeding by a creditor of the estate to compel her as executrix to account, whether as between her individually and the creditors of her deceased husband any part of such proceeds is chargeable with a lien in favor of his creditors under the Domestic Relations Law (L. 1896, ch. 272, § 22). The Code of Civil Procedure (§§ 2472, 2481, 2596, 2712, 2731) confers no such jurisdiction either expressly or impliedly; the amount of insurance purchased by the excess of premiums does not belong to the husband in his lifetime and forms no part of his estate after his death even as to creditors; the premiums paid do not constitute a debt against his wife in favor of himself or his estate; the proceeds are not assets and cannot be included in the inventory; they are liable "primarily" for his debts solely by force of the statute; they constitute a separate fund, devoted exclusively to the payment of the deficiency arising after all the assets of the estate have been applied upon the debts, while the surplus, if any, is to be returned to the widow. The phrase "property alleged to belong to the estate," as used in section 2731 of the Code, means property which is "deemed assets" as defined in section 2712, and which may be inventoried under section 2714. An allegation in the petition, therefore, that the insurance moneys were property of the estate, gives the surrogate no jurisdiction to try the question of title or enforce the lien any more than if a similar allegation had been made with reference to the title to real estate or other matters over which the surrogate has no jurisdiction. *Matter of Thompson.* 36

13. 1896, *Ch.* 908 — *Tax Law — Foreign Corporation Doing Business Within the State — When Bills Receivable for Goods Sold in Original Packages Are Taxable as Capital Employed Within This State.* Bills receivable, belonging to a foreign corporation maintaining an office within the state for the sale of its products, which are imported into this country and sold in the original packages, are taxable as capital employed within

SESSION LAWS — *Continued.*

this state within the meaning of the Tax Law (L. 1896, ch. 908, § 7), although such bills are the proceeds of imported goods sold in the original packages, where such bills are not *in transitu*, but are actually, and in the regular and permanent course of business, held within the state until maturity for the convenience of such corporation and the proceeds, in part, then remitted to the home office in a foreign country. *People ex rel. Burke* v. *Wells.* 275

14. *Idem — Transfer Tax — When Testator Stood "in the Mutually Acknowledged Relation of a Parent" to a Legatee, So That the Latter Is Entitled to Exemption under the Statute.* Where it appears upon the appraisal of the estate of a testator under the statute relating to taxable transfers of property, that a legatee of the testator, when a child about six years of age, was taken, upon her mother's death, from the home of her father to the home of her aunt, who was the wife of testator, where she continued to live as a member of his family until his death, a period of over thirty years, and that during her infancy she was supported and maintained at the expense of the testator and was subject exclusively to his control and that of his wife, the father in no respect contributing to her support nor exercising any direction over her, it is properly held that such legatee sustained to the testator the relation of a "child to whom any such decedent * * * for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relation began at or before the child's fifteenth birthday and was continuous for said ten years thereafter" (Tax Law [L. 1896, ch. 908], § 221, as amd. by L. 1898, ch. 88, and L. 1901, ch. 458), so that her legacy is taxable only at the rate of one per cent on the excess above $10,000; the fact that such legatee did not address her uncle and aunt as father and mother, nor they call her daughter, is of slight, if of any, importance, since being the niece of the testator's wife, it was more natural that she should continue to call them uncle and aunt than that she should adopt a new term. *Matter of Davis.* 299

1898, *Ch.* 88. See par. 14, this title.

1898, *Ch.* 182. See par. 18, this title.

15. 1900, *Ch.* 20 — *Forest, Fish and Game Law — Provision Prohibiting Possession of Game During Close Season Constitutional (Const. Art.* 1, § 6). The provisions of the Forest, Fish and Game Law (L. 1900, ch. 20, as amd. by L. 1902, ch. 194; L. 1902, ch. 317, and L. 1904, ch. 588), prohibiting the possession of game coming from without the state during the close season is not unconstitutional as a deprivation of property without due process of law and is a valid exercise of the police power of the state. *People ex rel. Hill* v. *Hesterberg.* 126

1901, *Ch.* 458. See par. 14, this title.

16. 1901, *Ch.* 466 — *New York City Charter — Retirement of Policeman for Disability.* The phrase "unfit for duty," as used in section 355 of the charter of the city of New York (L. 1901, ch. 466), authorizing the compulsory retirement of police officers, means their inability to discharge with average efficiency the duties of the respective grades to which they belong. The fact, therefore, that a policeman is unable to perform full police duty, or every conceivable duty, does not of itself render him liable to retirement. *People ex rel. Metcalf* v. *McAdoo.* 268

1902, *Ch.* 194. See par. 15, this title.

1902, *Ch.* 317. See par. 15, this title.

1904, *Ch.* 588. See par. 15, this title.

SESSION LAWS — *Continued.*

17. 1905, *Ch.* 241 — *Stock Transfer Tax Act — Constitutional Requirement as to Passage of Laws — Const. Art.* 5, § 15. The Stock Transfer Tax Act (L. 1905, ch. 241), alleged to be unconstitutional as having been passed without an emergency message before it had been on the desks of the members of the legislature in its final form for at least three calendar legislative days prior to its final passage, as required by section 15, article 5 of the Constitution, is not invalid for that reason, where it appears that the bill originated in the senate, lay on the desks of its members for three calendar legislative days in its final printed form, and also, in accordance with legislative practice, upon the desks of the members of the assembly during the same period and in the same form, was passed by the senate, and the second day thereafter by the assembly. The word "members," as used in the constitutional provision, means members of the legislature as an entity, not members of the senate and assembly merely as such; it is not necessary that the members of the house in which a bill originates must first have it on their desks for three days, and after its passage by them the members of the other house must have it on their desks three more days, before they can pass it; the constitutional requirements are met, when a bill has been upon the desks of the members of each house, in its final form, for at least three calendar legislative days, whether simultaneously or otherwise. *People ex rel. Hatch* v. *Reardon.* 431

18. 1905, *Ch.* 501, *Charter of Second Class Cities — Constitutional Law — Statute* (*L.* 1905, *Ch.* 501) *Amending "White Charter" Constitutional, Although Not Transmitted to Cities Affected Thereby* (*Const. Art.* 12, § 2). The statute (L. 1905, ch. 501) amending the "act for the government of cities of the second class" (L. 1898, ch. 182), commonly called the "White Charter," so that the provisions thereof shall not apply to any city that becomes a city of the second class in the enumeration to be had in the year 1905, until on and after the 1st day of January, 1908, except that the officers provided in such act for such city as becomes a city of the second class after such enumeration shall be elected at the city election to be held on the Tuesday succeeding the first Monday in November, 1907, is constitutional, although a certified copy thereof was not transmitted to any city or cities affected thereby, as required by the Constitution (Art. 12, § 2) in case of special city laws; since such statute is a general, not a special, city law under the provisions of said section defining general city laws as "those which relate to all the cities of one or more classes," and special city laws as those "which relate to a single city or to less than all the cities of a class." By its express terms the statute relates to all of the cities of the state, not then in the second class, which might thereafter come into that class as a result of the enumeration in 1905, so that all of such cities might have a reasonable time to adapt their government to the changed conditions. *Koster* v. *Coyne.* 494

19. *Idem — Yonkers (City of) — Effect of Statute* (*L.* 1905, *Ch.* 501) *When Yonkers Became a City of the Second Class under Enumeration of* 1905. Under the enumeration taken in 1905 the city of Yonkers, previously a city of the third class, governed by a special charter which provided for the election of two aldermen from each ward, became a city of the second class, but the statute (L. 1905, ch. 501) which amended the "White Charter," prevents the original provisions of that charter from so applying to the city of Yonkers as to reduce the number of aldermen from two to one in each ward until January 1, 1908. *Id.*

SHELL-FISH.

Act relating to cultivation — conditions of grant of lands under water precedent, not subsequent — title to oysters planted on land under water granted for that purpose to another party.

See OYSTERS AND SHELL-FISH, 1, 2.

STATUTES.
Inflicting penalties — construction.
See PENALTIES.

Constitutional requirement as to passage of laws.
See TAX, 4.

STEAMSHIP COMPANIES.
Obligation of, to persons other than passengers, awaiting docking of vessel.
See NEGLIGENCE, 12–14.

STOCKBROKERS.
Sale of securities by, without notice of time or place — insufficient notice.
See CONVERSION, 1, 2.

STOCKHOLDERS.
Cannot complain of alleged *ultra vires* acts of corporation after they have taken benefits thereunder.
See CORPORATIONS, 1.

Action by — when demand that corporation bring action unnecessary — action of board of directors voidable where majority of board are personally interested.
See CORPORATIONS, 5, 6.

Rights of preferred stockholders where capital stock is reduced while company is in default of dividend on preferred stock.
See CORPORATIONS, 7–10.

Stockholder's action — allegations necessary — demand that corporation bring action.
See PLEADING, 2–4.

STOCK TRANSFER TAX.
Validity of act imposing.
See TAX, 4–8.

STREET RAILWAYS.
Unlawful fare — penalty for excessive charge — when company not liable for penalty.
See RAILROADS, 1, 2.

STREETS.
Railroads — injury from electric car while crossing street — contributory negligence.
See NEGLIGENCE, 5, 6.

Defective walk at railroad crossing — liability for personal injuries.
See NEGLIGENCE, 10.

SURROGATES.
Have no jurisdiction to enforce creditor's lien against insurance moneys under section 22 of Domestic Relations Law.
See JURISDICTION, 1.

SYRACUSE (CITY OF).
Liability for the omission or commission of corporate acts — highways — when city not liable for failure to make provision against floods in stream used as outlet for sewer system.
See MUNICIPAL CORPORATIONS, 1–3.

TAX.

1. *Foreign Corporation Doing Business Within the State — When Bills Receivable for Goods Sold in Original Packages Are Taxable as Capital Employed Within This State — L.* 1896, *Ch.* 908, § 7. Bills receivable, belonging to a foreign corporation maintaining an office within the state for the sale of its products, which are imported into this country and sold in the original packages, are taxable as capital employed within this state within the meaning of the Tax Law (L. 1896, ch. 908, § 7), although such bills are the proceeds of imported goods sold in the original packages, where such bills are not *in transitu*, but are actually, and in the regular and permanent course of business, held within the state until maturity for the convenience of such corporation and the proceeds, in part, then remitted to the home office in a foreign country. *People ex rel. Burke* v. *Wells.* 275

2. *Transfer Tax — When Testator Stood "in the Mutually Acknowledged Relation of a Parent" to a Legatee, So That the Latter Is Entitled to Exemption under the Statute (Tax Law* [*L.* 1896, *Ch.* 908], § 221, *as amd. by L.* 1898, *Ch.* 88, *and L.* 1901, *Ch.* 458). Where it appears upon the appraisal of the estate of a testator under the statute relating to taxable transfers of property, that a legatee of the testator, when a child about six years of age, was taken, upon her mother's death, from the home of her father to the home of her aunt, who was the wife of testator, where she continued to live as a member of his family until his death, a period of over thirty years, and that during her infancy she was supported and maintained at the expense of the testator and was subject exclusively to his control and that of his wife, the father in no respect contributing to her support nor exercising any direction over her, it is properly held that such legatee sustained to the testator the relation of a "child to whom any such decedent * * * for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relation began at or before the child's fifteenth birthday and was continuous for said ten years thereafter" (Tax Law [L. 1896, ch. 908], § 221, as amd. by L. 1898, ch. 88, and L. 1901, ch. 458), so that her legacy is taxable only at the rate of one per cent on the excess above $10,000; the fact that such legatee did not address her uncle and aunt as father and mother, nor they call her daughter, is of slight, if of any, importance, since being the niece of the testator's wife, it was more natural that she should continue to call them uncle and aunt than that she should adopt a new term. *Matter of Davis.* 299

3. *Same — Evidence.* The fact that, when such legatee, upon the death of her father, became entitled to a legacy under her grandfather's will, the testator received the legacy as her guardian and upon her arriving at age turned it over to her without accounting for the income thereof received by him, is immaterial where the legatee had been thirteen years in the testator's family, supported wholly at his expense, before she had any property whatever and, after the receipt of the legacy, the testator had presumably used the income to give such legatee greater educational advantages than he had previously felt able to afford, since a father might have done the same thing, even if it be assumed that without authority from some court it would have been unjustified. *Id.*

4. *Stock Transfer Tax Act — Constitutional Requirement as to Passage of Laws — Const. Art.* 5, § 15. The Stock Transfer Tax Act (L. 1905, ch. 241), alleged to be unconstitutional as having been passed without an emergency message before it had been on the desks of the members of the legislature in its final form for at least three calendar legislative days prior to its final passage, as required by section 15, article 5 of the Constitution, is not invalid for that reason, where it appears that the bill originated in the senate, lay on the desks of its members for three calendar legislative days in its final printed form, and also, in accordance with legislative practice, upon the desks of the members of the assembly

TAX — *Continued.*

during the same period and in the same form, was passed by the senate, and the second day thereafter by the assembly. The word "members," as used in the constitutional provision, means members of the legislature as an entity, not members of the senate and assembly merely as such; it is not necessary that the members of the house in which a bill originates must first have it on their desks for three days, and after its passage by them the members of the other house must have it on their desks three more days, before they can pass it; the constitutional requirements are met, when a bill has been upon the desks of the members of each house, in its final form, for at least three calendar legislative days, whether simultaneously or otherwise. *People ex rel. Hatch* v. *Reardon.* 431

5. *Validity of Taxation of Transfer of Particular Class of Property Only.* The act imposes a tax, not upon property, but upon its transfer, and being uniform in its operation upon all transfers of the class named and upon all persons making such transfers within the state, is not obnoxious to the State or Federal Constitution as being so arbitrary, discriminating and unreasonable in taxing the transfer of one class of property only, as to deprive certain persons of their property without due process of law, and denying to them the equal protection of the laws. *Id.*

6. *Validity of Tax Though Not Based upon Values.* The tax imposed by the act being an excise tax imposed upon the transfer of a particular class of property does not depend upon any principle of valuation or any notice to the taxpayer; it is not a direct tax governed by the rule of appraisement but an indirect tax governed by the rule of uniformity: where there is no sale there is no tax: when there is a sale, the tax follows, which the legislature had the right to apportion in its discretion; it is valid, therefore, although not based upon the value of the certificates sold or of the sum for which they are sold. *Id.*

7. *Taxation of Transfers Made by Non-residents of Stock Issued by Foreign Corporations Valid Whether Tax Is Considered an Excise or a Property Tax.* The fact, that transfers made within the state by non-residents of certificates issued by foreign corporations and owned by such non-residents are subject to the tax, does not constitute it a tax upon property without the jurisdiction of the state; regarded as a tax not upon property but upon the privilege of its transfer, the state has the right to tax all business done and all contracts made within its territory, although relating to property situated elsewhere, provided they are not protected as federal agencies, whether the business is done or the contracts are made by residents or non-residents; assuming, however, that the tax is in effect a tax upon property, the certificates may, for the purposes of taxation, be treated as property, and when found here are within the jurisdiction of the state and subject to the tax, so that whether regarded as a tax on the transfer of or upon the certificates themselves, it affects neither persons nor property without the jurisdiction of the state. *Id.*

8. *Validity Not Affected by Interstate Commerce Clause of Federal Constitution.* The act does not violate the commerce clause of the Federal Constitution because it taxes transfers of certificates of stock in foreign corporations made by non-residents in this state; the tax is uniform, is upon the privilege of transferring within this state certificates of stock in all corporations, domestic or foreign, whether the transfers are made by citizens or non-residents; the fact that the certificates represent property situated in another jurisdiction is immaterial, and this would be true if it were a property tax. Interstate commerce means the exchange of property in one state for property in another state; where the certificates and the consideration received are here there is no transportation of either from another state, and there can be no movement of the property represented by such certificates; the tax, therefore, does not directly infringe upon interstate commerce. Assuming,

TAX — *Continued.*

however, that it is an indirect restraint thereon, in that it tends to prevent freedom of commercial intercourse, if there is no discrimination against persons or property from other states, that does not constitute such a substantial interference with interstate commerce as to amount to a state regulation thereof. State legislation which treats all persons, all property and all transfers of the same class in the same way under the same circumstances, and which does not directly or materially touch interstate commerce, does not violate the commerce clause of the Federal Constitution. *Id.*

TEACHERS.

Regulation as to use of religious dress by.

See SCHOOLS, 1–3.

TITLE.

To oysters planted on land under water granted for that purpose to another party.

See OYSTERS AND SHELL-FISH, 1, 2.

To roadbed of highway.

See REAL PROPERTY, 2–5.

Statutes of descent require ancestor to be possessed of some inheritable title — escheat.

See REAL PROPERTY, 10–12.

When aliens cannot inherit.

See REAL PROPERTY, 13.

TORTS.

Liability of railroad company for killing of trespasser by watchman.

See NEGLIGENCE, 2–4.

Injuries caused to property by negligent use of explosives in blasting.

See NEGLIGENCE, 7.

TRANSFER TAX.

When testator stood "in the mutually acknowledged relation of a parent" to a legatee, so that the latter is entitled to exemption under the statute.

See TAX 2, 3.

TRESPASS.

Liability for Result of Unintentional Encroachment. An encroachment by a railroad company upon land adjoining its right of way, even though unintentional, constitutes a trespass for which it is liable. *Wood* v. *N. Y. C. & H. R. R. R. Co.* 290

Construction of reservoir upon land before condemnation proceedings are had constitutes a trespass.

See EMINENT DOMAIN, 1.

TRIAL.

Witness — Failure to Administer Oath to a Witness in Proceeding to Remove Policeman — Waiver Thereof. The inadvertent omission of a deputy police commissioner of the city of New York to administer an oath to a witness, who testified against a patrolman upon one of three charges against him which were then being heard by the commissioner, such witness having been actually sworn and having testified as to one of the other charges, does not invalidate the proceedings where the patrolman, who must have known of the omission, made no objection and cross-examined the witness; since such patrolman, by omitting in any manner to object, consented that the testimony of such witness might

TRIAL — *Continued.*

be considered by the commissioner without any further sanction than such as might arise from the fact that he had already been sworn to tell the truth upon one of the two other charges which were tried at the same time. *People ex rel. Niebuhr* v. *McAdoo.* 304

For murder — erroneous instructions as to killing after the commission of a burglary had ceased — murder as in the commission of a felony.

See CRIMES, 3, 4.

Erroneous exclusion on cross-examination of questions affecting credibility of witness.

See EVIDENCE.

Erroneous exclusion of evidence tending to show breach of express warranty.

See INSURANCE, 4.

Undisputed facts do not necessarily create question of law.

See NEGLIGENCE, 1.

Credibility of witness a question of fact.

See NEGLIGENCE, 4.

When contributory negligence a question of law.

See NEGLIGENCE, 5, 6.

Erroneous nonsuit.

See NEGLIGENCE, 7.

Erroneous charge.

See NEGLIGENCE, 9.

Erroneous dismissal of complaint.

See NEGLIGENCE, 10.

By jury — right to.

See PRACTICE, 2.

Of question as to mental capacity of testatrix — evidence.

See WILL, 1–4.

TRUSTS.

For benefit of children — construction of clauses creating.

See REAL PROPERTY, 6.

ULTRA VIRES.

Stockholder cannot complain of *ultra vires* acts after he has taken benefits thereunder.

See CORPORATIONS, 1.

VENDOR AND PURCHASER.

1. *Measure of Damages — Action to Recover for False Representations Made to Induce Purchase of Real Property.* The measure of damages, in an action brought by a purchaser of real property to recover for alleged false representations, as to the rents received from part of the premises, made by the vendors to induce him to purchase the property, is the difference between the market value of the premises if leased according to the representation and their actual market value. *Ettlinger* v. *Weil.* 179

2. *Same — Evidence.* As bearing upon such issue, expert evidence is competent to prove the market value of the property, if the part in question had been leased for the rent represented by the defendant, since

VENDOR AND PURCHASER — *Continued.*

there is no way to prove the damages sustained by plaintiff except by starting with the fee value of the property if leased according to the representation; but evidence as to the market value, based upon the rent actually received by the vendors for the part in question, is incompetent, where such rent depended, not upon the market value of the whole property, but upon special considerations relating to the part in question, so that such rent cannot be made the standard of the actual value of the entire property. *Id.*

3. *Same — Erroneous Exclusion of Evidence Tending to Show That False Representation Caused No Damage.* The exclusion of questions, asked expert witnesses for defendant, regarding the rental value of the part of the premises in question and tending to show that the rental value thereof exceeded or was equal to the representation, constitutes reversible error; since false representations do not warrant the recovery of damages unless they cause pecuniary injury, and a misrepresentation that the premises were leased at a certain rate could result in no damage, if the actual rental value equalled or exceeded that rate. *Id.*

VENDOR AND VENDEE.

Contract for sale of goods in bond — when vendee entitled to duty refunded thereon.

See CONTRACT, 1.

Waiver of terms of contract of sale.

See CONTRACT, 2.

Agreement to pay more on favorable test of article sold.

See CONTRACT, 6.

Failure to deliver installments as agreed a breach of entire contract.

See ESTOPPEL.

VILLAGES.

Construction of reservoir upon land before condemnation proceedings are had constitutes a trespass — measure of compensation.

See EMINENT DOMAIN, 1–3.

WAIVER.

Of oath of arbitrator in common-law arbitration must be in writing.

See ARBITRAMENT AND AWARD, 2.

Of terms of contract of sale.

See CONTRACT, 2.

On failure to administer oath to witness in proceeding to remove policeman.

See TRIAL.

WARRANTY.

Breach of, as to one subject of insurance does not affect policy as to the other subjects.

See INSURANCE, 2–4.

Breach of — false statements to medical examiner in application for policy of life insurance.

See INSURANCE, 5.

WATERS AND WATERCOURSES.

When city not liable for failure to make provision against floods in stream used as outlet for sewage system.

See MUNICIPAL CORPORATIONS, 1–3.

WHARVES.
Obligation of steamship company to persons other than passengers awaiting docking of vessel.
See NEGLIGENCE, 12–14.

WILL.
1. *Mental Incapacity of Testatrix — Erroneous Admission of Evidence Relating to Mental Disease of Relatives — Code Civ. Pro.* §§ 834, 836. In a proceeding for the revocation of the probate of a will upon the ground that testatrix, at the time of the execution thereof, was not mentally capable of making a will, it is erroneous to permit the petitioner, in order to supplement and support evidence that the testatrix was afflicted with paresis, and against the objection that such testimony was incompetent and privileged, under section 834 of the Code of Civil Procedure, to prove by two physicians who had attended the mother and brother of testatrix in a professional capacity, and whose knowledge was obtained while attending such persons, and was necessary in order to treat them, that both the mother and brother of testatrix had been afflicted with "general paresis;" since, by the express terms of section 836, the provisions of section 834 are made to apply to "any examination of a person as a witness," and the fact that the testimony of the physicians related to patients who were not parties to the proceeding or interested therein, and who were dead at that time, does not take it out of the prohibition of the statute. *Matter of Myer.* 54

2. *Same.* Such evidence is also incompetent where there are no facts which tend to show that the paresis with which the mother and brother of testatrix are said to have been afflicted was acquired by them under circumstances which would render it transmissible so as to taint the family blood. While it is the rule in cases where the mental soundness of an individual is in question, that the insanity of blood relations in the ancestral line may be shown as tending to establish the fact in issue, indiscriminate and unexplained evidence of diseases afflicting such relations and affecting their mental faculties is incompetent. *Id.*

3. *Evidence — Erroneous Refusal to Strike Out Answer of Lay Witness as an Opinion.* Where a lay witness who had testified in detail as to acts and conversations of the testatrix was asked, "What was the impression they (the acts and conversations) made on you as to whether they were rational or irrational?" to which the witness answered, "She was irrational, I thought," the denial of a motion to strike out the answer is erroneous; while the question was proper in form the answer was in violation of the rule that lay witnesses are not permitted to give an opinion upon the question of mental capacity. *Id.*

4. *Same — Admissions of Executor and Legatee — Incompetent as Evidence against Other Legatees.* Evidence of admissions and declarations made by the executor and legatee of a disputed will, prior to the execution thereof and to the effect that the mind and memory of testatrix were poor and that she was not capable of doing business, is incompetent as against other legatees, parties to the proceeding and interested in the result, who are not jointly interested with such executor, but on the contrary have different and separate interests. *Id.*

5. *When Life Estate Will Not Be Converted into Absolute Estate in Favor of Same Person by Clause of Doubtful Meaning.* A life estate expressly created by a will cannot by a later clause be converted into an absolute estate in favor of the same person, on the theory that where two testamentary clauses are antagonistic the later must stand as the last expression of intention, unless the later clause is as clear as the first and cannot be reconciled therewith and the real intent of the testator cannot be gathered from the general scope of the will or otherwise; where there is no doubt as to the meaning of the first clause, while there is doubt as to the meaning of the later clause, so that either of two constructions is

WILL — *Continued.*

possible, that construction will be adopted which will give effect to both; doubt as to the meaning of the last, instead of destroying the limitation in the first clause, confirms it. *Adams* v. *Massey*. 62

6. *Same.* A holographic will provided, "I give, devise and bequeath to my * * * wife" certain real estate and personal property, including shares of corporate stock, "To have and to hold during her natural life." By a subsequent clause the testator provided, "I further give and bequeath any other property not herein otherwise before disposed of that may be in my possession at the time of my decease to my wife * * * first to liquidate any indebtedness that may be against me; the balance, if any, to be at her sole disposal." At the date of his will he had no property not specifically mentioned therein, except some money in the bank, and at the date of his death his assets were about the same, except the cash in the bank was less, and he had acquired some additional corporate stock. In an action by his representative commenced after the death of the widow, to recover the shares of capital stock given to her for life and claimed to have been bequeathed to her absolutely by the later clause, upon the ground that they were unbequeathed assets belonging to his estate, *held*, upon an examination of the two clauses — the first explicitly creating a life estate, while the later, to say the least, was of doubtful meaning — also upon a consideration of the situation of the parties at the time of the execution of the will and at testator's death, and of his actual intent as disclosed by the language used therein — that the life estate of the widow as to the securities mentioned was not by the later clause converted into an absolute estate in her favor, and that the plaintiff was entitled to recover. *Id.*

Construction of clauses creating trusts for benefit of children — when power to partition and allot real estate, given to trustee, involves power to sell.

See REAL PROPERTY, 6–8.

WITNESS.

Credibility of.

See EVIDENCE.

Credibility of, a question of fact.

See NEGLIGENCE, 4.

Failure to administer oath to — waiver thereof.

See TRIAL.

YONKERS (CITY OF).

Aldermen — election and terms of — proceedings to fill vacancy in office of.

See CITIES, 1–4.

TABULAR LIST OF OPINIONS.

CULLEN, Ch. J.

EQUITY.

When court upon denial of equitable relief may retain jurisdiction and determine whether damages should be awarded; Right to trial by jury; Landlord and tenant; Injury to enjoyment and occupation of leased premises; Tenant, not landlord, may recover damages therefor.

Miller v. Edison El. Illuminating Co., 17, 20.

DEMURRER.

Defect in parties defendant; Stockholder's action; Allegations necessary; Demurrer upon ground of improper joinder of causes of action; Stockholder's demand that corporation bring action.

O'Connor v. Virginia Passenger & Power Co., 46, 49.

CONSTITUTIONAL LAW.

Forest, Fish and Game Law; Provision prohibiting possession of game during close season constitutional (Const. art. 1, § 6); Power of Congress to authorize enactment of New York state law prohibiting importation and possession of foreign game during close season; Construction of complaint upon which warrant for violation of Game Law is issued.

People ex rel. Hill v. Hesterberg, 126, 129.

SALES.

Failure to deliver installments as agreed; Aggrieved party may elect to treat contract as continuing in force and sue for each breach thereof. (Dis. op.)

Pakas v. Hollingshead, 211, 218.

TAX.

Foreign corporation doing business within the state; When bills receivable for goods sold in original packages are taxable as capital employed within this state; L. 1896, ch. 908, § 7.

People ex rel. Burke v. Wells, 275, 276.

CARRIERS.

Limitation in passage ticket as to liability for loss of baggage.

Holmes v. North German Lloyd S. S. Co., 280, 282.

TRESPASS.

Liability for result of unintentional encroachment; Negligence; When contractual relations between plaintiff and defendant will prevent recovery for personal injuries; Erroneous charge.

Wood v. N. Y. C. & H. R. R. R. Co., 290, 291.

TRANSFER TAX.

When testator stood "in the mutually acknowledged relation of a parent" to a legatee, so that the latter is entitled to exemption under the statute (Tax Law [L. 1896, ch. 908], § 221, as amd. by L. 1898, ch. 88, and L. 1901, ch. 458; Evidence.

Matter of Davis, 299, 301.

INSURANCE (LIFE).

Breach of warranty; False statements to medical examiner as to health of insured; Insurance company not bound by true statements made to soliciting agent.

Butler v. Mich. Mut. Life Ins. Co., 337, 338.

INJUNCTION.

Mandatory injunction; Code Civ. Pro. §§ 603, 604; Violation of void order not punishable as for a civil contempt.

Bachman v. Harrington, 458, 459.

GRAY, J.

MUNICIPAL CORPORATIONS.

Liability for the omission or commission of corporate acts; Highways; When city is not liable for failure to make provision against floods in streams used as outlet for its system of sewers.

O'Donnell v. City of Syracuse, 1, 7.

EQUITY.

When court upon denial of equitable relief may retain jurisdiction and determine whether damages should be awarded; Right to trial by jury; Landlord and tenant; Injury to enjoyment and occupation of leased premises; When landlord, not tenant, may recover damages therefor. (Dis. op.)

Miller v. Edison El. Illuminating Co., 17, 24.

HIGHWAYS.

Presumption as to ownership of fee of roadbed; Partition; Effect of recitals in deeds partitioning lands under agreement upon question whether title to center of highway was conveyed or not; Deeds; Boundaries and description of land abutting on a street or highway; When title to center of roadbed of street, or highway, is conveyed. (Con. op.)

Van Winkle v. Van Winkle, 193, 209.

BUSINESS CORPORATIONS.

Construction of provisions in charter and certificates relating to dividends on preferred stock; Reduction of capital stock while company is in default of dividends on preferred stock; Rights of preferred stockholders; Resolution of board of directors directing payment of arrears of dividends on reduced preferred stock and also on common stock; Reduction of capital stock; Surplus created thereby cannot be applied upon arrears of dividends due to preferred stockholders.

Roberts v. Roberts-Wicks Co., 257, 262.

CARRIERS.

Limitation in passage ticket as to liability for loss of baggage. (Dis. op.)

Holmes v. North German Lloyd S. S. Co., 280, 285.

STATUTE INFLICTING PENALTIES.

Construction; Railroad; Unlawful fare; Mistake of law; Street railroads; Penalty for excessive charge by street railway company; When company overcoming certain grade not liable for penalty.

Goodspeed v. Ithaca St. Ry. Co., 351, 352.

MASTER AND SERVANT.

Agreement relieving employer from liability for negligence resulting in personal injuries, void as against public policy.

Johnston v. Fargo, 379, 380.

WHARVES AND PIERS.

Obligation of steamship companies to persons, other than passengers, awaiting the docking of vessels; Negligence; Rule of res ipsa loquitur; When applicable; Action to recover for injuries caused by breaking of steel hawser used in warping a vessel into a pier; When doctrine of res ipsa loquitur does not apply.

Duhme v. Hamburg-American Packet Co., 404, 406.

O'BRIEN, J.

WRIT OF PROHIBITION.

When it should be granted; Order denying motion to quash indictment not appealable. (Dis. op.)

People ex rel. Hummel v. Trial Term, 30, 34.

REAL PROPERTY.

Tenancy by curtesy.

Collins v. Russell, 74, 76.

NEGLIGENCE.

Undisputed facts do not necessarily create question of law; Railroads; No immunity from liability for acts of servant because he is also a public officer; Question for the jury; Witness; Credibility of, a question of fact.

Sharp v. Erie R. R. Co., 100, 102.

SALES.

Failure to deliver installments as agreed, a breach of entire contract; Damages recoverable in one, not successive actions.

Pakas v. Hollingshead, 211, 212.

NEGLIGENCE.

Action against city for causing death of plaintiff's intestate; Cause of action does not accrue until appointment of administratrix.

Crapo v. City of Syracuse, 561.

EDWARD T. BARTLETT, J.

FIRE INSURANCE.

No recovery for loss of property held as bailee where the latter is not responsible to owner.

Burke v. Continental Ins. Co., 77, 78.

NEGLIGENCE.

Action to recover for injuries caused to property by improper and negligent use of explosives in blasting; Pleading; Parties; Erroneous nonsuit.

Page v. Dempsey, 245, 246.

APPEAL.

Inconsistent findings.

Nickell v. Tracy, 386, 387.

NEGLIGENCE.

Municipal corporations; Action to recover for personal injuries; When charter provision, requiring notice of injury and intention to claim damages to be filed with corporation within one month of injury, is reasonable.

Biggs v. City of Geneva, 580, 581.

HAIGHT, J.

WRIT OF PROHIBITION.

Order denying motion to quash indictment appealable; Code Cr. Pro. §§ 485, 517.

People ex rel. Hummel v. Trial Term, 30, 31.

ARBITRATION.

Application of particular Code provisions (§§ 2365-2386) to common-law arbitration; Common-law arbitration; Waiver of oath must be in writing; Code Civ. Pro. § 2369.

Hinkle v. Zimmerman, 114, 115.

PLEADING.

Denial should be clear and specific; Code Civ. Pro. § 500.
Thompson v. Wittkop, 117, 119.

OYSTERS.

Act relating to cultivation of shell fish (L. 1887, ch. 584); Conditions of grant precedent not subsequent; Title to oysters planted on land under water granted for that purpose to another party.
Vroom v. Tilly, 168, 170.

HIGHWAYS.

Presumption as to ownership of fee of roadbed; Partition; Effect of recital in deeds partitioning lands under agreement upon question whether title to center of highway was conveyed or not; Deeds; Boundaries and description of land abutting on a street or highway; When title to center of roadbed of street, or highway, is conveyed.
Van Winkle v. Van Winkle, 193, 198.

MURDER.

Erroneous instructions as to killing after the commission of a burglary had ceased; Penal Code, § 183; Murder as in the commission of a felony; Penal Code, § 218, subd. 5.
People v. Hüter, 237, 239.

CHARTER PARTY.

When charterers, not owners, are liable for loss of goods resulting from alleged negligence in unloading goods; Common-law rule as to notice to consignee; When it is not avoided by provisions of bill of lading; When notice to consignee is insufficient; Liability of carrier for loss of goods caused by collapse of pier.
Rosenstein v. Vogemann, 325, 328.

WILL.

Construction of clauses creating trusts for benefit of children; When power to partition and allot real estate, given to trustee, involves power to sell; Action to partition and sell real estate after some of the cestuis que trustent have become of age; Power of court; When judgment therein is res adjudicata against parties thereto; When judgment of sale in such action of partition is not in contravention of provisions of will; Service of summons on infant residing out of the state; When regular under statute in force in 1869 (Code Civ. Pro. § 448 and 2 R. S. part 3, ch. 5, tit. 3, § 12).
O'Donaghue v. Smith, 365, 369.

NEW YORK (CITY OF).

Dismissal of patrolman by police commissioner of New York city after conviction upon charges preferred against him; Certiorari; Conviction will not be reviewed for clerical error by which final order did not conform to findings made by the commissioner.

People ex rel. Reagan v. Partridge, 566.

VANN, J.

SURROGATE'S COURT.

Surrogate has no jurisdiction to enforce creditor's lien against insurance moneys under section 22, Domestic Relations Law; Code Civ. Pro. §§ 2472, 2481, 2596, 2712, 2731; Procedure to enforce liens.

Matter of Thompson, 36, 38.

WILL.

When life estate will not be converted into absolute estate in favor of same person by clause of doubtful meaning.

Adams v. Massey, 62, 68.

FIRE INSURANCE.

Breach of warranty as to one subject of insurance does not affect policy as to the other subjects; When warranties in application and policy have same effect; Erroneous exclusion of evidence tending to show breach of express warranty.

Donley v. Glens Falls Ins. Co., 107, 111.

OYSTERS.

Act relating to cultivation of shell fish (L. 1887, ch. 584); Conditions of grant; Title to oysters planted on land under water granted for that purpose to another party. (Dis. op.)

Vroom v. Tilly, 168, 178.

MEASURE OF DAMAGES.

Action to recover for false representations made to induce purchase of real property; Erroneous exclusion of evidence tending to show that false representation caused no damage.

Ettlinger v. Weil, 179, 180.

NEW YORK CITY.

Retirement of policeman for disability; Certificate must be signed by examining surgeons as individuals, not as board; Insufficiency of certificate.

People ex rel. Metcalf v. McAdoo, 268, 271.

SALES.

Contract for sale of goods in bond; When vendee entitled to duty refunded thereon.

Solomon Tobacco Co. v. Cohen, 308, 311.

MORTGAGE FORECLOSURE.

Right of wife to redeem land sold in action to which she was not a party; Action to redeem; Measure of relief; Improper adjustment of equities between the parties.

Mackenna v. Fidelity Trust Co., 411, 414.

STOCK TRANSFER TAX ACT.

Constitutional requirement as to passage of laws; Const. art. 3 § 15; Validity of taxation of transfer of particular class of property only; Validity of tax though not based upon values; Taxation of transfers made by non-residents of stock issued by foreign corporations valid whether tax is considered an excise or a property tax; Validity not affected by interstate commerce clause of Federal Constitution.

People ex rel. Hatch v. Reardon, 431, 437.

WERNER, J.

WILL.

Mental incapacity of testatrix; Erroneous admission of evidence relating to mental disease of relatives; Code Civ. Pro. §§ 834, 836; Erroneous refusal to strike out answer of lay witness as an opinion; Admissions of executor and legatee; Incompetent as evidence against other legatees.

Matter of Myer, 54, 57.

FORECLOSURE CHATTEL MORTGAGE.

Remedy; Jurisdiction; New trial.

Lembeck & Betz' Brewing Co. v. Sexton, 185, 188.

EASEMENTS.

Although reserved, pass with conveyance of freehold; Effect of reservation is to make grantee the trustee of moneys received for subsequent conveyance; Grantee alone can sue for damages or execute release; Action by grantor to set aside subsequent conveyance and to recover damages for invasion or destruction of easements.

McKenna v. Brooklyn Union El. R. R. Co., 391, 396.

NEGLIGENCE.

Safety of working place; Assumption of risk; Contributory negligence; Issue of fact.

Reilly v. Troy Brick Company, 399, 400.

APPEAL.

Erroneous order of Appellate Division reversing order of Special Term confirming the report of a referee and dismissing the proceedings instead of ordering new trial.

Matter of Froment, 568, 569.

WILLARD BARTLETT, J.

STOCKHOLDERS' ACTION.

Stockholder cannot complain of alleged ultra vires acts after he has taken benefits thereunder.

Wormser v. Metropolitan Street Ry. Co., 83, 87.

CONVERSION.

Sale of securities by stockbroker without notice of time or place; Insufficient notice.

Content v. Banner, 121, 123.

CHAMPERTY.

Employment of layman by attorneys to procure clients a misdemeanor and warrants forfeiture of office; Malpractice; Code Civ. Pro. § 67.

Matter of Clark, 222, 223.

WITNESS.

Failure to administer oath to a witness in proceeding to remove policeman; Waiver thereof.

People ex rel. Niebuhr v. McAdoo, 304, 305.

CONTRACT OF SALE.

Waiver.

Birkett v. Nichols, 315, 316.

VILLAGES.

Water works; Reservoir constructed upon land before condemnation proceedings are had and compensation awarded to owner, constitutes a trespass; Award to owner, made after construction of reservoir should include value of construction and work placed upon land; Rule for ascertaining measure of compensation.

Village of St. Johnsville v. Smith, 341, 343.

SALES.

Agreement to pay more on favorable test of article; Measure of damages.

Hopedale El. Co. v. Electric S. B. Co., 356, 358.

SCHOOLS.

Authority of superintendent of public instruction to regulate management; Regulation as to use of religious dress by teachers; Refusal to comply with regulation forfeits salary.

O'Connor v. Hendrick, 421, 425.

NEW YORK PRODUCE EXCHANGE.

Beneficiaries' interest in gratuity fund assignable as security for sums advanced to pay dues and assessments.

Holmes v. Seaman, 486, 490.

HISCOCK, J.

WRIT OF PROHIBITION.

When will not issue to restrain prosecution of action in Justice's Court; Irregular service of summons.

People ex rel. Ballin v. Smith, 96, 97.

INSURANCE.

Statutory stipulations required of foreign corporations as a condition of doing business in a state are for the benefit of those only who contract in reliance thereon; Effective revocation, as to non-residents, of power of attorney authorizing service of process upon state insurance commissioner; When power of attorney, irrevocable on its face, may be revoked.

Hunter v. Mutual Reserve L. Ins. Co., 136, 139.

CONTRIBUTORY NEGLIGENCE.

When question of law.

Lofsten v. Brooklyn Heights R. R. Co., 148, 149.

APPEAL.

Question of fact.

Levy v. McCreery Realty Corpn., 163, 165.

ESCHEAT.

Failure to file declaration of citizenship by alien heir; Insufficiency of statutes relied upon as waiving right of escheat; L. 1877, ch. 111; L. 1893, ch. 207; 1 R. S. 754, § 22; Statutes of descent require ancestor to be possessed of some inheritable title.

McCormack v. Coddington, 467, 471.

LIBEL.

Defamatory statements as to certain class of public officials; Action by one of such persons to recover damages; Demurrer.

Weston v. Commercial Advertiser Assn., 479, 481.

CITIES.

Constitutional law; Statute (L. 1905, ch. 501) amending "White Charter," constitutional although not transmitted to cities affected thereby (Const. art. 12, § 2); Yonkers (city of); Effect of statute (L. 1905, ch. 501); When Yonkers became a city of the second class under enumeration of 1905; Construction and effect of provisions of Constitution (Const. art. 12, § 3) upon charter provisions relating to election and terms of aldermen; Proceedings to fill vacancy in office of aldermen; Resolution ordering special election of alderman to fill vacancy; Immaterial error.

Koster v. Coyne, 494, 497.

MALICIOUS PROSECUTION.

When probable cause not a question of law. (Dis. op.)

Rawson v. Leggett, 504, 512.

CHASE, J.

EVIDENCE.

Erroneous exclusion on cross-examination of questions affecting credibility of witnesses.

Rossenbach v. Order of Foresters, 92, 93.

APPEAL.

Court of Appeals will examine pleadings to ascertain what facts are admitted; stockholders' action; When demand that corporation bring action unnecessary; Corporations; Action of board of directors voidable where majority of board are personally interested; Prosperity of corporation no defense.

Jacobson v. Brooklyn Lumber Co., 152, 155.

TRESPASS.

Liability for result of unintentional encroachment; Negligence; Contractual relations between plaintiff and defendant will not prevent recovery for personal injuries. (Dis. op.)

Wood v. N. Y. C. & H. R. R. R. Co., 290, 296.

NEGLIGENCE.

Defective walk at railroad crossing; Question of fact.

Durr v. N. Y. C. & H. R. R. R. Co., 320, 321.

PER CURIAM.

LIQUOR TAX LAW.

When rear door of a city dwelling is not an "entrance" within meaning of section 17, subd. 8.
McDougal v. Malaghan, 253, 254.

MALICIOUS PROSECUTION.

When probable cause a question of law.
Rawson v. Leggett, 504, 506.

SURROGATE'S COURT.

Foreign will; Invalidity of ancillary letters.
Baldwin v. Rice, 523.

APPEAL.

Stipulation; Contracts of employment.
Hooke v. Financier Co., 541.

APPEAL.

Motion for re-argument upon ground that points made upon argument were not discussed in opinion; Such fact does not warrant conclusion that points were overlooked.
Burke v. Continental Insurance Co., 570, 571.

ESCHEAT.

Lands in this state inherited by a non-resident alien from a naturalized citizen, who took by purchase, cannot be inherited from such non-resident alien by his nearest descendant who is also a non-resident alien.
Stewart v. Russell, 601, 602.

CONTRACTS.

Contract to pay money to trustees for the support of a daughter-in-law and grandchildren; Rights of daughter-in-law under contract.
Recknagel v. Stewart, 614, 615.

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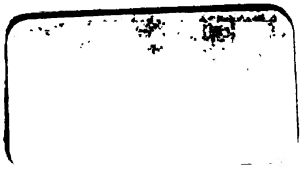
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